Supreme Court, U.S.
FILED
FEB 19 2002
OFFICE OF THE CLERK

(1)

No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-6934
Attorney for Petitioner

PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau

DONNA M. LACH *
THOMAS M. BURNHAM
SANJAY T. TAILOR
Assistant State's Attorneys
of Counsel

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether local governmental entities are subject to *qui tam* actions under the False Claims Act. 31 U.S.C. § 3729.

LIST OF PARTIES

The parties to the proceeding below were the petitioner/defendant, Cook County, Illinois, the petitioner's co-defendant, the Hektoen Institute For Medical Research, and the respondent/plaintiff, Janet Chandler, a relator under the False Claims Act. The United States declined to intervene in this case but participated in the issues raised in this petition as an *amicus curiae* before the United States Court of Appeals for the Seventh Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT	5
A. Background	5
B. The Statutory Framework of the False Claims Act	6
C. The Proceedings Below	8
REASONS FOR GRANTING THE PETITION	11
I. THERE IS A SQUARE AND IRRECONCILABLE CONFLICT IN THE CIRCUITS REGARDING LOCAL GOVERNMENTAL LIABILITY UNDER THE FALSE CLAIMS ACT	12
II. THE ISSUES RAISED ARE RECURRING AND CRITICAL TO TENS OF THOUSANDS OF LOCAL GOVERNMENTS	20
III. THE DECISION BELOW IS MANIFESTLY INCORRECT	21
CONCLUSION	29
APPENDICES	1a

TABLE OF AUTHORITIES

CASES — Page

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748 (1981) ..... *passim*
King v. St. Vincent Hospital, 502 U.S. 215, 112 S. Ct. 570 (1991) 21
Owen v. City of Independence, Mo., 445 U.S. 622, 100 S. Ct. 1398 (1980) 24
Pierson v. Ray, 386 U.S. 547 (1967) 24
Schultzen v. Woodbury Central Community Sch. Dist., No. C01-4089-MWB, 2002 U.S. Dist. LEXIS 3010 (N.D. Iowa Feb. 22, 2002) 25
Swierkiewicz v. Sorema N.A., ___ U.S. ___, 122 S. Ct. 992 (2002) 5
United States v. Bornstein, 423 U.S. 303, 96 S. Ct. 523 (1976) 21
United States v. McNinch, 356 U.S. 595, 78 S. Ct. 950 (1958) 21
United States ex rel. Dunleavy v. County of Delaware, 279 F.3d 219 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002) ..... *passim*
United States ex rel Dunleavy v. County of Delaware, 2000 WL 1522854, 2000 U.S. Dist. LEXIS 14980 (E.D.Pa. Oct. 12, 2000) 9
United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002) ..... *passim*
United States ex rel. Giles v. Sardie, 2000 U.S. Dist. LEXIS 21068 (C.D. Cal. July 27, 2000) ... 17, 18
United States ex rel. Graber v. City of New York, 8 F. Supp. 2d 343 (S.D. N.Y. 1998) ..... *passim*
United States ex rel Honeywell v. San Francisco Housing Authority., et al., 2002 U.S. Dist. LEXIS 9743 (N.D. Cal. July 12, 2001) 17

TABLE OF AUTHORITIES—Continued

Page

United States ex rel. K & R Ltd. P'ship v. Massachusetts Hsg. Fin. Agency, 154 F. Supp. 2d 19 (D.D.C. 2001) 18, 19
United States ex rel. King v. Jackson County Hosp. Corp. of Ariana, Fl., 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001) 18
United States ex rel. Kinney v. Hennepin County Med. Ctr., 2002 U.S. Dist. LEXIS 10170 (D. Minn. Jan. 22, 2001) 16
United States ex rel. Long v. SCS Business and Technical Inst., Inc., 173 F.3d 870 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202, 120 S. Ct. 2194 (2000) 13, 22
United States ex rel. Rosales v. San Francisco Hous. Auth., 173 F. Supp. 2d 987 (N.D. Cal. 2001) 16
United States ex re. Satalich v. City of Los Angeles, 160 F. Supp. 2d 1092 (C.D. Cal. 2001) 17, 18
Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 120 S. Ct. 1858 ..... *passim*
United States ex rel. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998), *rev'd*, 529 U.S. 765, 120 S. Ct. 1898 (2000) 16
Wright v. West, 505 U.S. 277, 112 S.Ct. 2482 (1992) 23

STATUTES AND OTHER AUTHORITY

31 U.S.C. § 3729 ..... *passim*
31 U.S.C. § 3730 ..... 27, 28
31 U.S.C. § 3733 ..... 7, 27

TABLE OF AUTHORITIES—Continued

	Page
31 U.S.C. § 3801	8
42 U.S.C. § 1983	26
MISCELLANEOUS	
S. Rep. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266	*passim*
S. 467, 37th Cong. 3d Sess. (1863)	22, 23

IN THE

Supreme Court of the United States

No. ___

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cook County, Illinois ("Cook County"), respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit entered on January 22, 2002.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District of Illinois, which dismissed Cook County from this False Claims Act action. The Seventh Circuit's opinion (App. 1a-26a) is reported at 277 F.3d 969 (7th Cir. 2002). The district court's opinion granting Cook County's motion to reconsider its earlier opinion and dismissing Cook County (App. 27a-29a) is reported at 118 F. Supp. 2d 902 (N.D. Ill. 2000).

The district court's earlier opinion denying Cook County's motion to dismiss (App. 30a-49a) is reported at 35 F. Supp. 2d 1078 (N.D. Ill. 1999). The Seventh Circuit's Order dismissing the appeal of the district court's earlier opinion (App. 50a) is unreported. The Court's denial of *certiorari* of that Seventh Circuit dismissal order (App. 51a) is reported at 528 U.S. 931, 120 S. Ct. 329 (1999).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which Cook County seeks review was entered on January 22, 2002. This Court's jurisdiction to review the Seventh Circuit's opinion is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

§ 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes

to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative

action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3729 (1994).

STATEMENT

A. Background

This lawsuit arises out of a $5 million federal grant to fund a medical treatment program and research study at Cook County Hospital ("CCH"). The allegations[1] are as follows: In 1989, the United States Department of Health and Human Services ("DHHS") and the National Institute of Drug Abuse ("NIDA") called for proposals to provide treatment to and conduct a study of substance-abusing pregnant women. (Am. Compl. at ¶ 15.) CCH, a Cook County-owned and operated non-profit hospital that provides health care and related services to residents of Cook County, submitted a grant proposal. (*Id.* at ¶¶ 12, 13, 16.) NIDA awarded CCH the grant on September 30, 1989 and released initial payments shortly thereafter. (*Id.* at ¶ 27.) In the first two years of the grant, the protocol was developed, and, around July 1991, CCH began recruiting participants. (*Id.* at ¶ 28.) On September 1, 1993, NIDA transferred the administration of the grant from CCH to the Hektoen Institute of Medical Research ("Hektoen"), a non-profit organization that conducts medical research and manages research grants. (*Id.* at ¶¶ 11, 29.) Hektoen employed Janet Chandler ("Relator"), a clinical

[1] After the district court denied its original motion to dismiss, Cook County filed an answer to the Amended Complaint, denying the substantive allegations. This case went to the Seventh Circuit on a grant of Cook County's motion for reconsideration dismissing Cook County from this lawsuit. All the factual allegations contained in a complaint are taken as true on review of the grant of a motion to dismiss. *Swierkiewicz v. Sorema N.A.*, ___ U.S. ___, 122 S. Ct. 992, 995 n.1 (2002).

psychologist, as project director on October 1, 1993, (*id.* at ¶ 29), and fired her on January 24, 1995. (*Id.* at ¶ 97.)

Relator brought this False Claims Act ("FCA") action, 31 U.S.C. § 3729, alleging that "[t]he false claims arise out of the defendants' knowing and deliberate failure to comply with the express terms and conditions incorporated in and promised by the grant, the reporting of 'ghost' research subjects, and other material misrepresentations about the progress and success of the study" and that "defendants disregarded the required protocol." (*Id.* at ¶ 4.) Relator additionally alleges that she was retaliated against for disclosing these deficiencies "to the defendants and to appropriate governmental oversight agencies." (*Id.* at ¶ 5.) Relator claims that the United States was damaged in the total amount of the grant, $5 million. (*Id.* at ¶ 111.) Relator seeks treble the amount of the grant, that is to say, $15 million, plus fines of up to $10,000 each for an unspecified number of alleged false claims, plus costs and attorneys' fees. The defendants are Cook County, as the owner and operator of CCH, and Hektoen, as the administrator of the grant. The United States declined to intervene.

B. The Statutory Framework of the False Claims Act

The FCA subjects "[a]ny person" to liability who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). Congress has not defined the term "person" in the FCA, but the Court has noted that "the term 'person' has remained in the statute unchanged since 1863," when the statute was first enacted. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12, 120 S. Ct. 1858, 1868, n.12 (2000). In 1986, Congress enacted significant amendments to the FCA. Recently, a number of lawsuits have been filed against States and other governmental entities, one of which reached the Court. On

May 22, 2000, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Court held that States and their agencies are not "persons" subject to liability under the FCA. *Id.* at 787, 120 S. Ct. at 1870. The Court reached its conclusion as a matter of statutory construction. *Id.*

In analyzing whether States are "persons" under the FCA, *Stevens* began with the longstanding interpretative presumption that the word "person" does not include a sovereign without an affirmative showing of a contrary intent from Congress. *Id.* at 780-81, 120 S. Ct. at 1866-67. The Court then considered the historical context of the original enactment, noting that the FCA was enacted to stop the fraud perpetrated by private contractors during the Civil War. *Id.* at 781, 120 S. Ct. at 1867. The Court concluded that the text of the 1863 enactment did "less than nothing to overcome the presumption that States are *not* covered." *Id.* at 782, 120 S. Ct. at 1868 (emphasis in original).

The Court found that certain features of the 1986 amendments "further support the conclusion that States are not subject to *qui tam* liability." *Id.* at 783, 120 S. Ct. at 1868. First, the provision which allows the Attorney General to issue civil investigative demands ("CID"), 31 U.S.C. § 3733, defines "person" as including States. The Court reasoned that "[t]he presence of such a definitional provision in § 3733, together with the absence of such a provision from the definitional provisions contained in § 3729 . . . suggests that States are not 'persons' for purposes of *qui tam* liability under § 3729." *Id.* at 784, 120 S. Ct. at 1868-69. Next, the Court found that the mandatory treble damage scheme of the current version of the FCA is "essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.* at 784-85, 120 S. Ct. at 1869 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63, 101 S. Ct. 2748 (1981)). Third, the Court noted that

the Program Fraud Civil Remedies Act of 1986 ("PFCRA"), 31 U.S.C. § 3801, the FCA's sister scheme that creates administrative remedies for false claims, contains a definition for "persons" subject to liability that does not include States. *Id.* at 786, 120 S. Ct. at 1870. "It would be most peculiar to subject States to treble damages and civil penalties in *qui tam* actions under the FCA, but exempt them from the relatively smaller damages provided under the PFCRA." *Id.* The Court concluded that the FCA does not subject States and their agencies to *qui tam* liability. *Id.* at 788, 120 S. Ct. at 1871.

C. The Proceedings Below

1. Relator filed her complaint under seal on January 24, 1997. After the United States declined to intervene, Relator amended her complaint and served it on the defendants. All the defendants moved to dismiss. During the briefing of the motions to dismiss, an opinion issued from the United States District Court for the Southern District of New York that held that the FCA "does not authorize suits against municipal entities." *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998). In light of that decision, Cook County sought, and was granted, leave to supplement its motion to dismiss.

On February 8, 1999, the district court denied Cook County's motion to dismiss, holding that municipal entities are "persons" under the FCA and that, because the mandatory treble damage scheme is not punitive, Cook County is not immune from an FCA suit. *United States ex rel. Janet Chandler, Ph.D. v. The Hektoen Institute For Medical Research, et al.*, 35 F. Supp. 2d 1078 (N.D. Ill. 1999).[2] (App. 30a) Cook County appealed the district court's denial

[2] CCH, originally named as a defendant, was dismissed as a nonsuable entity, and Cook County's motion to dismiss as to the whistleblower claims under the FCA and state common law was granted. *Chandler*, 35 F. Supp. 2d at 1078, 1087. (App. 49a)

of its immunity claim under the collateral order doctrine. In an unpublished order, on May 18, 1999, the Seventh Circuit dismissed the appeal. *Janet Chandler, Doctor v. Cook County, Illinois*, No. 99-1415 (7th Cir. May 18, 1999). (App. 50a) Cook County petitioned the Court for a writ of certiorari, which the Court denied on October 12, 1999. *Cook County, Illinois v. Janet Chandler, Ph.D.*, 528 U.S. 931, 120 S. Ct. 329 (1999). (App. 51a)

2. After the Court decided *Stevens*, Cook County moved the district court to reconsider its denial of Cook County's motion to dismiss. In its opinion, the district court maintained its original position that Cook County is a person under the FCA. *United States ex rel. Chandler v. Hektoen Institute for Med. Research*, 118 F. Supp. 2d 902, 903 (N.D. Ill. 2000). (App. 28a) However, because, under *Stevens*, the FCA's mandatory damages are punitive, the district court, adopting the reasoning of *United States ex rel. Dunleavy v. County of Delaware*, 2000 WL 1522854, 2000 U.S. Dist. LEXIS 14980 (E.D.Pa. Oct. 12, 2000), held that Cook County is immune from an FCA suit and dismissed Cook County from this lawsuit. *Id.* Relator appealed to the Seventh Circuit. In the appellate court, the United States filed an *amicus curiae* brief on behalf of the Relator, as did the Taxpayers Against Fraud.[3] The Seventh Circuit reversed the dismissal of Cook County.

The Seventh Circuit began its analysis with the proposition that "municipal corporations were presumptively included within the meaning of 'person'" in 1863 and, finding no

[3] The Seventh Circuit consolidated Relator's appeal of the dismissal of Cook County, (Appeal No. 00-4110), with Cook County's appeal of the district court's order requiring Cook County to disclose to Relator's attorneys original unredacted treatment and research records of the grant participants. (Appeal No. 01-1810.) *Chandler*, 277 F.3d at 973. (App. 6a.) The United States filed an *amicus curiae* brief on behalf of Cook County with respect to Appeal No. 01-1810. The issues raised in Appeal No. 01-1810 are not involved in this petition.

"exception for suits against municipalities," determined that Congress intended to subject local governments to liability under the original version of the FCA. *Chandler*, 277 F.3d at 974. (App. 8a.) Next, the Seventh Circuit concluded that the 1986 amendments point "to a finding of continued municipal liability." *Id.* at 975-76. In so doing, the Seventh Circuit relied on a 1986 Senate Committee Report for the proposition that the purpose of the amendments was "to increase the effectiveness of the Act" by giving federal law officers more effective tools and by increasing the percentage of proceeds a relator may receive. *Id.* (citing S. Rep. No. 99-345 at 2, *reprinted in* 1986 U.S.C.C.A.N. 5266). (App. 10a-11a.)

Having found that local governments are "persons" under the FCA, the Seventh Circuit considered the 1986 increase in the FCA's penalty from double to treble damages to decide whether the common-law immunity from punitive damages on governmental entities applies. *Id.* at 976-77. (App. 13a.) As the Seventh Circuit read *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981), the immunity does not apply to the FCA. *Id.* at 977-978. (App. 13a-16a.) In the Seventh Circuit's view, the taxpayers have already been enriched by the municipality's fraudulent conduct in that "any ill-gotten gains from the federal government produce more services or lower taxes." *Id.* at 978. (App. 15a.) The Seventh Circuit reasoned that the FCA's treble damages scheme is "a response specifically determined by Congress as necessary for the effective operation of the FCA." *Id.* (App. 16a.) Because Congress did not specifically indicate that it intended to exempt local governments from the scope of the FCA, the Seventh Circuit refused to find that Congress did so *sub silentio*. *Id.* at 979. (App. 17a.) The Seventh Circuit rejected the presumption of governmental immunity from punitive damages because "Congress, in creating, in 1863, and then strengthening, in 1986, a comprehensive mechanism designed

to remedy fraud against the federal government clearly determined that recipients of federal funds must be subject to such a deterrent." *Id.* (App. 18a.)

The Seventh Circuit reversed the district court's dismissal of Cook County and remanded the case to the district court. *Id.* at 983. (App. 26a.) Recognizing that the unanimous decision constituted a split from the Fifth Circuit's holding in *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 495 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002), the panel circulated the opinion to the entire court, but no active judge voted to hear this case *en banc*. *Chandler*, 277 F.3d at 980 n.10. (App. 19a.) One week after the Seventh Circuit decided *Chandler*, the Third Circuit affirmed the district court and held that local governments may not be sued under the FCA. *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 226 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002). Cook County moved for a stay of mandate pending its petition for certiorari, which the Seventh Circuit granted. *United States ex rel. Chandler v. Cook County, Illinois*, Nos. 00-4110 & 01-1810, 2002 U.S. App. LEXIS 2587 (7th Cir. Feb. 15, 2002).

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve a question of first impression under federal law, a question that is critical to tens of thousands of local governments receiving federal funds, namely, whether local governments are subject to suit under the FCA. The question is recurring throughout the federal courts. Yet, the circuits are sharply divided, not only as to their ultimate holdings, but also as to their reasoning. District courts in circuits that have not yet decided the issue are also coming to different conclusions. Much of the conflict is over the meaning of *Stevens* and the application of *City of Newport* to FCA claims against local governments. The Court should take hold of this

opportunity to resolve the split in the circuits, correct the serious errors made by the Seventh Circuit in this case, and clarify an issue critically impacting local governments across the United States.

I. THERE IS A SQUARE AND IRRECONCILABLE CONFLICT IN THE CIRCUITS REGARDING LOCAL GOVERNMENTAL LIABILITY UNDER THE FALSE CLAIMS ACT.

In ruling that local governments are "persons" under the FCA, the Seventh Circuit knowingly parted company with the Fifth Circuit, the first of the circuits to analyze whether local governments are subject to liability under the FCA. One week after the Seventh Circuit's opinion, the Third Circuit, siding with the Fifth Circuit, held that local governments are not subject to suit under the FCA.

1. The issue addressed by the Fifth Circuit was whether a school board qualifies as "any person" under the FCA. *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 489 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808, *rhg. denied*, 122 S. Ct. 1198 (2002). A jury found that the school board had submitted 1,570 false claims to the federal government over the course of eleven years and that the federal government's actual damages were $7.6 million, which the court trebled to $22.8 million and added a civil penalty of $7.85 million. *Id.* at 488.

The Fifth Circuit found guidance in that portion of *Stevens* holding that the FCA's mandatory treble damage scheme is punitive and "contrary to the well-settled presumption that governments, including local governments, are not subject to punitive damages." *Id.* at 491. Noting that the Court has held that "imposing punitive damages on local governments is ordinarily contrary to sound public policy," the Fifth Circuit went on to say that: "Though a local government can properly be made to pay compensation for the wrongful acts of its

agents, punishing a local government is pointless." *Id.* The Fifth Circuit was particularly troubled by a policy that would impose punitive damages on local governments in favor of the federal government: "Requiring such a transfer payment would reflect a judgment by Congress that denying the schoolchildren of Orleans Parish needed services, or requiring the taxpayers of Orleans Parish to pay higher taxes, is justified in light of the relatively minor benefit to the federal treasury." *Id.* at 492. The Fifth Circuit concluded: "Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the False Claims Act." *Id.*

Unlike the Seventh Circuit, the Fifth Circuit found the 1986 Senate Committee Report at S. Rep. No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266, faulty for two reasons: "it cites to a case concerned with an entirely different federal statute, namely 42 U.S.C. §1983" and it is "post-enactment legislative history, and 'utterly irrelevant' to determining the meaning of the term person in the liability portions of the False Claims Act." *Id.* at 489-90 n.3. The Fifth Circuit found that neither the relator nor the United States provided any authority to indicate that, in 1863, Congress contemplated liability for local governments under the FCA. *Id.* at 494. The Fifth Circuit concluded by finding that a statement made by the D.C. Circuit was applicable to local governments: "'Even if one assumes that states commit a good deal of fraud against the federal government, it cannot seriously be argued that the very purpose of the [False Claims] Act would be thwarted if states were not liable under the [False Claims] Act.'" *Id.* at 494-95 (quoting *United States ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 870, 875 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202, 120 S. Ct. 2194 (2000)). Under the Fifth Circuit's holding, "the term person in the liability provision of the [FCA] does not include local governments." *Garibaldi*, 244 F.3d at 495.

2. One week after the Seventh Circuit rendered its decision in *Chandler*, the Third Circuit weighed in. Like the Fifth Circuit and contrary to the Seventh Circuit, the Third Circuit held that local governments cannot be subject to an FCA suit by a *qui tam* relator. *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 226 (3d Cir. 2002), *rhg. denied*, No. 00-3691 (Feb. 22, 2002).

The Third Circuit began its analysis with the well-established presumption that "[u]nless Congress clearly provides otherwise, a local governmental entity is immune from punitive damages awards." *Id.* at 222. The Third Circuit viewed the issue of "whether the term 'person' as used in the Act encompasses local governments . . . [as] simply the other side of the coin with respect to the question . . . whether Congress clearly abrogated local governmental immunity under the FCA." *Id.* at 223 ("If Congress clearly expressed its intention to encompass local governments within the ambit of FCA liability as a 'person,' then it must also have intended to abrogate the common law immunity of local governments against punitive damages under the FCA."). The Third Circuit determined that nothing on the face of the 1863 enactment or the current version of the FCA shows a clear indication from Congress that local governments are subject to punitive damages under the FCA. *Id.* at 224 ("The Act is utterly devoid of any specific intention to subject local governments to its strictures."). The Third Circuit found that "[t]his lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA." *Id.* In so finding, the Third Circuit implicitly rejected the very arguments that carried the day in the Seventh Circuit, namely, (i) local governments were presumptively "persons" in 1863 and, without an indication from Congress to the contrary, automatically subject to the FCA; and (ii) in 1986, when Congress imposed punitive damages, it intended to subject

local governments to punitive damages. Unlike the Seventh Circuit, the Third Circuit did not find that the 1986 imposition of punitive damages was a "clear intent to abrogate common law immunity and subject local governments to punitive damages awards." *Id.* at 224-25.

In addition, the Third Circuit, like the Fifth Circuit and unlike the Seventh Circuit, did not find the 1986 Senate Committee Report persuasive. *Id.* at 225 (citing *Stevens*, 529 U.S. at 783 n.12, 120 S. Ct. at 1868 n.12). The Third Circuit concluded that there is "only ambiguity as to whether Congress intended to disturb the well-settled doctrine of local governmental immunity from punitive damages under the FCA," which "is not enough . . . to carry the day." *Id.*

While the FCA's mandatory punitive damage scheme was central to their analyses, there are subtle differences between the Fifth and the Third Circuits' decisions, with the Fifth Circuit ultimately finding that local governments are not persons under the FCA, *see Garibaldi*, 244 F.3d at 495, and the Third Circuit finding that they are immune from suit. *Dunleavy*, 279 F.3d at 226.

3. Although the remaining circuits have yet to address whether local governments are subject to FCA suits, district courts within the Second, Eighth, Ninth, Eleventh, and D.C. Circuits have reached conflicting results.

- In the Second Circuit, the United States District Court for the Southern District of New York was the first federal court to address whether local governments could be sued under the FCA. *United States ex rel. Graber v. City of New York, et al.*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998). After conducting an exhaustive recitation of the FCA's background, the *Graber* court dismissed both the City and State of New York, holding that "Congress in 1863 did not contemplate that states and cities would be defendants in False Claims Act suits." *Id.* at 352.

Graber also concluded that States and municipalities were not subjected to the FCA by the 1986 amendments because Congress nowhere explicitly expressed an intent to impose punitive damages on them. *Id.* at 352-53. The Second Circuit's subsequent decision in *United States ex rel. Stevens v. Vermont Agency of Nat'l Resources*, 162 F.3d 195 (2d Cir. 1998), impliedly reversed the *Graber* decision. The Court, in turn, reversed the Second Circuit's opinion. *Stevens*, 529 U.S. 765, 120 S. Ct. 1858.

- In the Eighth Circuit, a district court concluded that local governments are not persons under the FCA. *United States ex rel. Kinney v. Hennepin County Med. Ctr.*, 2002 U.S. Dist. LEXIS 10170 (D. Minn. Jan. 22, 2001). There, a former paramedic of defendant Hennepin County Medical Center ("HCMC") alleged false claims to the federal Medicare and Medicaid programs. *Id.* at *2. The district court found in favor of HCMC under the common-law presumption against municipal liability for punitive damages: "When Congress amended the FCA to increase the liability from double damages to treble damages, thus making the FCA 'essentially punitive,' it did not clearly authorize the imposition of such damages against municipalities." *Id.* at *24. Based on the common-law immunity, HCMC was dismissed with prejudice.
- In the Ninth Circuit, the district courts are in conflict with each other.
  - In the Northern District of California, one district court held that local governments are subject to the FCA, and another district court held the opposite. In *United States ex rel. Rosales v. San Francisco Hsg. Auth.*, 173 F. Supp. 2d 987 (N.D. Cal. 2001), relators brought an FCA action against the San Francisco Housing Authority ("SFHA") and the City and County of San Francisco, alleging that false statements were

made to the Department of Housing and Urban Development ("HUD") for grant funds. *Id.* at 991. The district court, after analyzing *Stevens*, reasoned that local governments were considered persons at the time of the original enactment, *id.* at 1015, and that the mandatory treble damage scheme is remedial and not punitive. *Id.* at 1024. On the other hand, in *United States ex rel. Honeywell v. San Francisco Housing Auth., et al.*, 2002 U.S. Dist. LEXIS 9743 (N.D. Cal. July 12, 2001), the district court, declining to follow *Rosales*, instead relied on the Fifth Circuit's decision in *Garibaldi*, which was decided shortly after *Rosales*. *Id.* at *10. The complaint in *Honeywell* was also brought against the SFHA and the City of San Francisco for alleged false claims to HUD. *Id.* at *2. The *Honeywell* court, however, determined that, under *Stevens*, the FCA's damage scheme is punitive, noting the "'presumption against the imposition of punitive damages on governmental entities.'" *Id.* (citing *Stevens*, 529 U.S. at 785, 120 S. Ct. at 1869). The *Honeywell* court further noted that there is no indication that Congress ever intended to subject local governments to the FCA's liability. *Id.*

- In the Central District of California, the same conflict exists. In *United States ex rel. Giles v. Sardie*, 2000 U.S. Dist. LEXIS 21068 (C.D. Cal. July 27, 2000), an FCA case brought against, *inter alia*, the City of Los Angeles, the district court was not "persuaded by the argument that *Stevens* stands for the proposition that municipalities are immune from the liability provision of section 3729(a) of the FCA." *Id.* at *13. Consequently, the City of Los Angeles' motion to dismiss was denied. *Id.* at *16. *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Cal. 2001), was also brought against the City of Los Angeles. The *Satalich* court, finding both *Rosales* and

Giles unpersuasive, concluded "that *Stevens* bars FCA suits against municipalities." *Id.* at 1102. Relying on municipal immunity from punitive damages and rejecting the argument that "any person" must include municipal corporations, the district court dismissed the City of Los Angeles. *Id.* at 1104, 1106.

- In the Eleventh Circuit, a district court concluded that the legislative history shows that local governments were not intended "to be defined as persons" under the FCA. *United States ex rel. King v. Jackson County Hosp. Corp. of Mariana, Fl.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001). A surgeon at Jackson County Hospital ("JCH") brought an FCA suit alleging that false statements were made to the federal government under Medicare and Medicaid. After analyzing the legislative history of the FCA, the district court concluded that "Congress did not envision that local governments would be subject to FCA liability at the time of enactment." *Id.* at *17. The district court further concluded that "local governmental agencies should not be held liable because the FCA's imposition of punitive damages is contrary to the presumption that local governments are not subject to punitive damages." *Id.* The district court granted JCH's motion to dismiss on the ground that it "is not a 'person' under the liability provisions of the FCA." *Id.* at *23.

- In the D.C. Circuit, the district court held that governmental entities are subject to *qui tam* liability under the FCA. *United States ex rel. K & R Ltd. P'ship v. Massachusetts Hsg. Fin. Agency*, 154 F. Supp. 2d 19, 26 (D.D.C. 2001). There, the relator filed a *qui tam* action against the Massachusetts Housing Finance Agency ("MHFA"), an entity that was created by the Massachusetts Legislature. *Id.* at 20-21. The court determined

that the MHFA, as a "governmental entity," *id.* at 21, is not immune from the FCA's mandatory punitive damages in light of *Stevens*:

> If this Court were to now dismiss K&R's complaint on the grounds that the MHFA is immune from the damages awarded under the FCA, it would, in effect, accept a loophole in the Act that would allow entities with some connection to the state, but that are considered "persons" subject to suit under the FCA, to escape liability for any false claims made to the federal government. Although Congress has made the damages awarded under the current version of the FCA punitive in nature, this Court does not believe that in doing so Congress intended to create such a gap in the statute.

Id. at 24. MHFA's motion to dismiss was, thus, denied. *Id.* at 27.

As the above cases demonstrate, the question of whether the FCA subjects local governments to liability has resulted in irreconcilable conflict, primarily stemming from a fundamental disagreement over the meaning of *Stevens* and the application of *City of Newport* to FCA claims against local governments. There is no realistic probability that the conflict will go away without an interpretation from the Court. Therefore, further review is needed.

II. THE ISSUES RAISED ARE RECURRING AND CRITICAL FOR TENS OF THOUSANDS OF LOCAL GOVERNMENTS.

Whether Congress intended to include local governments as "persons" subject to liability under the FCA, especially in light of the punitive damage scheme under the 1986 amendments, is an important issue of federal law. As the above FCA opinions illustrate, given the vast number of local governments throughout the country, this issue will recur, and

the courts will continue to reach different conclusions under diverse interpretations of *Stevens* as well as *City of Newport*, resulting in a disparate application of the FCA.

There are tens of thousands of units of local governments in the United States, including municipalities, counties, and school districts. Local governments and the United States enjoy a cooperative relationship, with the federal government providing funding for services that local governments, in turn, provide directly to its residents. In fact, it is this cooperative relationship of passing funds to a local government for the administration of direct services that, in part, renders local governments "deep pocket" targets for FCA lawsuits. If applicable to them, the FCA's punitive damage scheme leaves local governments with equally unpalatable choices of rejecting federal funds or, if sued, either being coerced into high settlements by the threat of punitive damages or incurring the cost of litigation and risking a substantial adverse judgment, which, of course, is shouldered by the local taxpayers. The ramifications of *qui tam* suits for local governments can, indeed, be devastating. For that reason, during the briefing of the *Stevens* case, Cook County, together with the City of Los Angeles and the City and County of San Francisco, joined the City of New York's *amicus curiae* brief on behalf of the Vermont Agency of Natural Resources. Clearly, the issues raised in this case have comparable importance for local governments around the nation.

The Court granted review in *Stevens* to settle a conflict regarding the important issue of whether States and their agencies are subject to *qui tam* suits under the FCA. Now, the conflict in the circuits involves whether local governments are subject to *qui tam* liability under the FCA. There are many more units of local government than there are States and state agencies that are potential defendants in an FCA

suit. Given the number of local governments and the importance of the question of the applicability of the FCA to all local governments, review should not be delayed.

III. THE DECISION BELOW IS MANIFESTLY INCORRECT.

The Court's review is also warranted because the Seventh Circuit's decision that local governments are subject to FCA suits is manifestly incorrect.

1. Neither the text nor the legislative history of the FCA support the Seventh Circuit's conclusion that local governments are subject to FCA suits. Yet, without any consideration of the context of the word "person" in the original statute and in its legislative history, the Seventh Circuit's decision rests on an erroneous assumption that the term "person," when otherwise undefined in a statute and without a specific indication from Congress to the contrary, necessarily includes local governments. *Chandler*, 277 F.3d at 974. (App. 8a.) The Seventh Circuit skipped a vital step in its statutory construction analysis. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 574 (1991) ("the meaning of statutory language, plain or not, depends on context"). Had the Seventh Circuit examined the meaning of "person" within the context of the FCA's enactment, it could not have reconciled its conclusion with this Court's recurring interpretation of the FCA's purpose as confronting massive fraud on the federal government by *private* contractors during the Civil War, *Stevens*, 529 U.S. at 781, 120 S. Ct. at 1867; *United States v. Bornstein*, 423 U.S. 303, 309, 96 S. Ct. 523, 528 (1976); *United States v. McNinch*, 356 U.S. 595, 599, 78 S. Ct. 950, 953 (1958), and as not being "designed to reach every fraud practiced on the Government," *McNinch*, 356 U.S. at 599, 78 S. Ct. at 953, or to reach "all types of *fraudsters*." *Stevens*, 529 U.S. at 781 n.10, 120 S. Ct. at 1867 n.10 (emphasis in the original). Under the standards of

statutory construction, the context of the FCA overcomes the Seventh Circuit's assumption that local governments are "persons" under the FCA.

The text of the original version of the FCA indicates that it was not directed at local governments. The Court observed in *Stevens*: "far from indicating that States were covered, it did not even make clear that private corporations were since it applied only to any person not in the military" and "imposed criminal penalties that included imprisonment." *Id.* at 782, 120 S. Ct. at 1867. The Court's rationale likewise applies to local governments. The reference to military status and imposition of criminal penalties strongly imply that Congress did not consider local governments to be subject to suit under the FCA. *Cf. United States ex rel. Long v. SCS Business & Technical Inst., Inc.*, 173 F.3d 870, 878 (D.C. Cir. 1999) (criminal penalty inconsistent with state liability under FCA).

Moreover, the genesis of the FCA further confirms that local governments were not Congress' target. In its original form, Senate Bill 467 broadly targeted "any person" submitting a false claim. S. 467, 37th Cong. 3d Sess. § 1 (1863). On January 29, 1863, the bill was amended to, among other things, replace the phrase "any person" with the phrase "any person in the land or naval forces" and "any person not in the military." *Id.* at §§ 1, 4. That local governments were not Congress' intended targets in 1863 is evident by its narrowing and refining the scope of Senate Bill 467 prior to passage. Senate Bill 467 also originally included a provision deeming any person contracting with the United States to provide military supplies both a member of the military and subject to court-martial in case of fraud. *Id.* at § 2. Though that provision was ultimately withdrawn from the bill, the fact that Congress was contemplating court-martial of contractors defrauding the military is further proof that local governments were not intended to be subject to liability under the FCA as originally enacted.

Instead of studying the 1863 text and legislative history, the Seventh Circuit turned to a 1986 Senate Committee Report as authority that the 1863 enactment included local governments within its scope. *Chandler*, 277 F.3d at 975. (App. 10a-11a.) The Seventh Circuit distinguished *Stevens'* dismissal of that report as "erroneous," *Stevens*, 529 U.S. at 783 n. 12, 120 S. Ct. at 1868 n.12, by finding it correct with respect to governmental entities that are not "arms of the state itself." *Chandler*, 277 F.3d at 975 n.8. (App. 10a-11a.) *Stevens* did not make such a distinction between States and other governmental entities. Moreover, that report, based on a mistaken interpretation of the original enactment and case law, is likewise erroneous with respect to local governments. *See Dunleavy*, 279 F.3d at 225; *Garibaldi*, 244 F.3d at 489-90 n.3; *Graber*, 8 F. Supp. 2d at 353. Reliance on that report is further suspect because "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *See Wright v. West*, 505 U.S. 277, 295, n.9, 112 S. Ct. 2482, 2492 n.9 (1992) [citation omitted]. The Seventh Circuit's determination that Congress, in 1863, intended local governments to be "persons" subject to the FCA's liability was error.

2. The Seventh Circuit's initial determination that Congress, in 1863, included local governments as "persons" under the FCA tainted its analysis of the 1986 amendments. Not only is the Seventh Circuit's pronouncement that three changes to the FCA enacted in 1986 demonstrate "continued municipal liability," *Chandler*, 277 F.3d at 975, (App. 9a), not borne out by any of those changes, the 1986 amendments, in fact, confirm that local governments were never intended subjects of FCA liability in 1863.

The most significant of the 1986 changes considered by the Seventh Circuit is the increase in the FCA's damages from double to treble. The increase in damages implicates a presumption that both States and local governments enjoy. Indeed, the Court, in holding that the treble damages plus

penalties imposed by the 1986 amendments to the FCA are punitive, reaffirmed the "presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 785 (citing *City of Newport*, 453 U.S. at 262-63, 101 S. Ct. at 2757-58). The Court has, "on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637, 100 S. Ct. 1398, 1408 (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). In *Stevens,* the Court found Congress' imposition of mandatory punitive damages in the 1986 amendments to be further support for the conclusion that States were never included as "persons" under the FCA. *Id.* at 785, 120 S. Ct. at 1869. That reasoning likewise applies to local governments. *See City of Newport*, 453 U.S. at 260 n.20, 101 S. Ct. at 2756 n.20 ("The general rule today is that no punitive damages are allowed [against a municipal entity] unless expressly authorized by statute.").

The heart of the question, then, is what constitutes explicit Congressional intent to impose punitive damages. Nowhere in the text or legislative history of the 1986 amendments to the FCA did Congress explicitly impose the FCA's punitive damages on local governments. For that reason, the Fifth Circuit refused to find that Congress intended to subject municipal entities to liability under the FCA. *Garibaldi*, 244 F.3d at 492 ("Though Congress is free to make that determination if it chooses, we will not find such a choice absent clear language in the text of the FCA."). Also, for that reason, the Third Circuit found: "At best, after considering the text of the statute and its legislative history, we find only ambiguity as to whether Congress intended to disturb the well-settled doctrine of local governmental immunity from punitive damages under the FCA. Ambiguity, however, is not enough . . . to carry the day." *Dunleavy*, 279 F.3d at 225.

The Seventh Circuit, on the other hand, while acknowledging that Congress nowhere explicitly subjected local governments to punitive damages under the FCA, looked for an explicit *exemption* of municipal entities from the FCA's punitive damages and found none. *Chandler*, 277 F.3d at 979 ("When it desires to exempt municipal entities from federal statutory schemes, Congress has not hesitated to do so."). (App. 17a.) In so doing, the Seventh Circuit employed a standard that is at odds with the Court's teachings by ignoring this Court's consistent refusal "to construe the general language of [a statute] as automatically abolishing such traditional immunities by implication." *See City of Newport*, 453 U.S. 247, 258, 101 S. Ct. 2748, 2755. In short, the Seventh Circuit took the well-established presumption against the imposition of punitive damages on local governments absent an explicit indication from Congress and turned it on its head.[4]

The error in the Seventh Circuit's approach is further demonstrated by the policy justifications offered for its view that Congress implicitly imposed punitive damages on local governments. First, the Seventh Circuit distinguished *City of Newport* on the grounds that "there are important differences between [the punitive damages] available under sec. 1983 and those imposed by the FCA." *Chandler*, 277 F.3d at 978. (App. 15a.) The Seventh Circuit reasoned:

> Under the FCA, at least a portion of the recovery will come from the monies taken by the municipality through its false claims, whereas under § 1983 both the

---

[4] One federal district court recently "performed an exhaustive search and yet was unable to find any court of appeals decisions, with the exception of the Seventh Circuit's recent decision in Chandler, authorizing an award of punitive damages against a municipality, absent express statutory authority to do so." *Schultzen v. Woodbury Central Community Sch. Dist.*, No. C01-4089-MWB, 2002 U.S. Dist. LEXIS 3010 (N.D. Iowa Feb. 22, 2002).

> compensatory and punitive damages come directly from the tax base. Further, in the FCA context, the taxpayers themselves have been enriched by the fraudulent conduct of the municipality. Presumably any ill-gotten gains from the federal government produce more services or lower taxes. Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit.

Id.[5] The Seventh Circuit's reasoning deviates from this Court's expressed concern with the hardship caused by imposing damages on local taxpayers that are *three times higher than* any amount of ill-gotten gains. *See Stevens*, 529 U.S. at 785 n.15, 120 S. Ct. at 1869 n.15. As the Fifth Circuit noted: "Though a local government can properly be made to pay compensation for the wrongful acts of its agents, punishing a local government is pointless." *Garibaldi*, 244 F.3d at 491.

The Seventh Circuit was also persuaded by the fact that the FCA's damages are not divided into compensatory and punitive, as are the damages under 42 U.S.C. § 1983. *Chandler*, 277 F.3d at 978. (App. 16a.) *Stevens* did not recognize such a distinction between the two statutes, instead noting that both Section 1983 and the FCA are federal laws "designed to benefit the citizens of the United States." *Stevens*, 529 U.S. at 785 n.15, 120 S. Ct. at 1869 n.15 ("[a] better read of *Newport* is that we were concerned with imposing punitive damages on taxpayers under any circumstances"). The Seventh Circuit did not take into consideration that the federal govern-

[5] The Seventh Circuit's reasoning is belied by Relator's own Amended Complaint, which suggests that federal monies were used in a manner that did not produce the intended benefit to the tax-paying public.

ment has available causes of action other than the FCA to recoup damages for any "ill-gotten gains." *See* 31 U.S.C. § 3730(c)(5).

Contrary to the Seventh Circuit's determination, two other changes to the FCA in 1986, in fact, support a conclusion that Congress never intended local governments to be sued under the FCA. In discussing the CID provision at Section 3733 that defines "person" to include "any State or political subdivision of a State . . . for purposes of this section," the Seventh Circuit concluded that "[a]lthough this definition does not demonstrate Congressional intent to impose liability on municipalities, it certainly does not support an inference that Congress intended them to be exempt." *Chandler*, 277 F.3d at 975. (App. 10a.) Yet, applying the Court's reasoning in *Stevens*, Congress' addition of local governments in the CID provision at Section 3733, coupled with its decision not to define "person" in Section 3729 to include local governments, leads to the same conclusion as the Court reached *Stevens* with respect to States, namely, that local governments are not persons for purposes of FCA suits.

The third change to the FCA in 1986 considered by the Seventh Circuit was the whistleblower provision. Although the whistleblower provision uses the word "employer" without defining the term, 31 U.S.C. § 3730(h), the 1986 Senate Committee Report states that "employers" include "public as well as private sector entities." *Chandler*, 277 F.3d at 975 (citing S. Rep. 99-345 at 34-35). (App. 10a-11a.) As noted above, that Senate Committee Report is itself of suspect value, being based on an inaccurate interpretation of the law. *See Garibaldi*, 244 F.3d at 489 n.3; *Graber*, 8 F. Supp. 2d at 353. According to the Seventh Circuit, there would be no reason to subject local governments to whistleblower liability if they were not already subject to FCA liability. However, that is not true. Congress can subject a public entity to liability for retaliation without making that entity subject to

liability under the FCA, because the federal government can pursue remedies independent of Section 3729, such as a cause of action in breach of contract or fraud, or by way of the administrative process. *See* 31 U.S.C. § 3730(c)(5). Moreover, the Seventh Circuit's reasoning here, too, is incompatible with the presumption that punitive damages are not imposed on local governments without an explicit indication from Congress. *See City of Newport*, 453 U.S. at 261, 271, 101 S. Ct. at 2757. Back-dooring liability for local governments through an unrelated provision is not the explicit abrogation of the imposition of punitive damages demanded by *City of Newport*. Taken together, the serious errors in the Seventh Circuit's analysis provide an additional reason for this Court to review the important questions raised in this petition at this time.

Despite the 139-year history of the FCA, local governments have only recently become its frequent targets. As it stands now, local governmental liability under the FCA is directly dependent upon geographic location: the thousands of local governments in the Seventh Circuit are subject to suit under the FCA, while those in the Fifth and Third Circuits are not. Given the profound and potentially catastrophic impact of FCA suits on local governments, the split in the circuits, and the resulting disparate application of the FCA throughout the country, the Court should take this opportunity to resolve this critical issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. DEVINE
State's Attorney of
Cook County, Illinois
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-6934
Attorney for Petitioner

PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau

DONNA M. LACH *
THOMAS M. BURNHAM
SANJAY T. TAILOR
Assistant State's Attorneys
of Counsel

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 00-4110 & 01-1810

UNITED STATES OF AMERICA *ex rel.*,
JANET CHANDLER, Ph.D.,
Plaintiff-Appellant, Cross-Appellee,

v.

COOK COUNTY, ILLINOIS,[1]
Defendant-Appellee, Cross-Appellant.

September 5, 2001, Argued
January 22, 2002, Decided

JUDGES: Before FLAUM, *Chief Judge*, and POSNER and RIPPLE, *Circuit Judges*.

OPINION:

RIPPLE, *Circuit Judge*.

Janet Chandler, Ph.D., brought this *qui tam* action as relator on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 et seq., to recover funds that allegedly were obtained fraudulently by defendants Hektoen Institute for Medical Research ("Hektoen") and Cook County, Illinois, in the administration of a drug treatment program. The district court dismissed the suit against Cook County,

---

[1] The Hektoen Institute for Medical Research, a defendant in this action in the district court, filed a motion for non-involvement in this appeal. The court granted that motion.

holding that, as a municipality, the County was immune from punitive damages under the FCA. Dr. Chandler appealed and, for the reasons set forth in this opinion, we reverse in case No. 00-4110.

Cook County also appealed or, in the alternative, requested mandamus, from the district court's discovery order requiring Cook County to turn over certain drug treatment records. We believe the district court's discovery order does not comply with federal privacy regulations. Therefore mandamus will issue requiring the district court to vacate its discovery order and to proceed in conformity with this opinion.

I. BACKGROUND

A. Cook County as a Party

Dr. Janet Chandler brought this *qui tam* action against Hektoen and Cook County for alleged misconduct in their handling of a federal research grant.[2] Cook County Hospital ("CCH") applied for, and received, a $ 5 million grant from the National Institute of Drug Abuse ("NIDA") to study the treatment of drug-dependant pregnant women. Along with its grant application, CCH submitted an assurance of compliance plan to the Department of Health and Human Services ("HHS"), representing that CCH would comply with federal human subject research regulations. The grant initially was awarded to CCH, but was transferred to Hektoen, an affiliate of CCH established to receive funds and conduct medical research. The program was dubbed "New Start"; it was designed to provide treatment and conduct research. New Start provided treatment to drug-dependant pregnant women and studied the effect of a stepped-up battery of medical and

[2] Dr. Chandler initially sued Cook County Hospital in addition to these defendants. The hospital was found to have no identity independent of Cook County and was dismissed from the case. *See United States ex rel. Chandler v. Hektoen Inst.*, 35 F. Supp. 2d 1078, 1086 (N.D. Ill. 1999).

social services on its patients, compared with a control group receiving the typical treatment available in the community.

On September 1, 1993, Dr. Chandler was hired as New Start's project director. While in this post, Dr. Chandler came to believe that the defendants were violating the terms of the grant and federal regulations. Further, she believed they were misrepresenting the success of the New Start program and submitting false progress reports to the government, which included information on "ghost" program participants who did not exist. Dr. Chandler alleged that CCH did not follow mandatory protocol for research on human subjects and for dispensing methadone to pregnant women, did not obtain informed consent from study participants, did not obtain thorough medical or drug histories, provided substandard care, failed to keep accurate records and failed to randomize participants.

In 1994, Dr. Chandler began to speak up, informing physicians at CCH that she was concerned with the handling of the New Start program. She told them that the program was violating the terms of the grant, the assurance of compliance plan and pertinent federal regulations. Ultimately Dr. Chandler was discharged and brought this action. She alleged that CCH retaliated against her by revoking some of her responsibilities and then firing her in January 1995, after she was accused of lying in her report to NIDA on the study's alleged failure.

Cook County moved to dismiss on the ground that it was not a "person" within the meaning of the False Claims Act. *See* 31 U.S.C. § 3729(a).[3] The district court denied Cook

[3] § 3729 provides:

(a) Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the

County's motion to dismiss, holding that the County was a person within the meaning of the FCA. *See Chandler v. Hektoen Inst.*, 35 F. Supp. 2d 1078, 1084 (N.D. Ill. 1999) (*Chandler I*). Specifically, the court was persuaded by the definition of person within the Civil Investigative Demand ("CID") provision of the FCA, added in 1986. *See* 31 U.S.C. § 3733(l)(4); *Chandler I*, 35 F. Supp. 2d at 1084. The statute defines person as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." 31 U.S.C. § 3733(l)(4). The district court further held that the treble damages provision of the FCA was not punitive, so that municipalities' traditional immunity from punitive damages was not implicated. *See Chandler I*, 35 F. Supp. 2d at 1084-85. Therefore, Cook County's motion was denied.

In 2000, the Supreme Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). *Stevens* held that states were not persons within the meaning of the FCA and concluded that the treble damages provision was punitive. *See id.* at 783-84. Cook County filed a motion to reconsider in light of *Stevens*. *See Chandler v. Hektoen Inst.*, 118 F. Supp. 2d 902, 902 (N.D. Ill. 2000) (*Chandler II*). The district court found nothing in *Stevens* to "alter its conclusion

---

> Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . .
>
> is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.
>
> 31 U.S.C. § 3729(a).

that the County is a 'person' for purposes of the FCA" but found that "it is quite clear that under *Stevens* the County is immune from the imposition of punitive damages." *Id.* at 903. The court dismissed the case against Cook County.

B. Discovery

Dr. Chandler brought this action on January 27, 1997. She sought the records of the New Start program in discovery. The voluminous records contained *inter alia* physicians' notes, consent forms, medical records, patient questionnaires and drug test results. The County resisted, pointing to federal regulations requiring researchers to keep drug and alcohol treatment records confidential. On January 7, 1999, the district court granted Dr. Chandler's motion to compel and ordered Cook County to produce the records with patient-identifying information redacted. Notice was sent to the former New Start patients, informing them that "Janet Chandler has been given permission by the Court to review your New Start records, so long as all the identifying information and other personal information on the records is blacked out." R.72, Ex.B. The notice also provided the former patients with forms to reply if they wanted to object to the disclosure or if they consented to the disclosure of identifying information. The patients were informed that if they did nothing, the redacted records would be disclosed to Dr. Chandler and her representatives.

Over the next year or so, the parties were contentious about the quality of the redacted records. Dr. Chandler's attorneys claimed that many records were missing or incomplete. There was a problem with the index created by Cook County to obscure patient identifying information in compliance with the court's discovery order. The court ordered the County to produce a "key" to cross-reference original and substituted file numbers because the substituted file numbers could not

be linked with a large quantity of study data. In early 2001, Dr. Chandler went back to the district court seeking access to the unredacted patient records.

On March 5, 2001, the district court ordered Cook County to turn over unredacted patient records to Dr. Chandler's representatives and asked the parties to draft protective orders. On March 14, 2001, the district court entered a protective order governing the disclosure of unredacted patient records to Dr. Chandler's attorneys. The order limited disclosure to three of Dr. Chandler's attorneys and one paralegal for ten days. They were prohibited from disclosing information to anyone, including Dr. Chandler and were not permitted to record any of the information. Cook County sought an emergency stay pending appeal. After briefing from both sides, the motions panel of this court granted the stay on June 12, 2001 and denied Dr. Chandler's motion to dismiss for want of jurisdiction. We consolidated the two appeals.

II. DISCUSSION

The False Claims Act establishes civil penalties for "[a]ny person" who, *inter alia,* "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(1), (3). Such a person "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains be cause of the act of that person." *Id.* § 3729(a). The FCA may be enforced by the Attorney General, *id.* § 3730(a), or by a private person, known as a relator, who brings a *qui tam* suit "for the person and for the United States Government . . . in the name of the Government," *id.* § 3730(b). A *qui tam* suit is filed in camera,

and remains under seal for sixty days. *Id.* § 3730(b)(2). The relator must present all material evidence to the Government; during the sixty day period, the Government may intervene and proceed with the action itself. *Id.* If the Government declines to assume responsibility for the suit, the relator may proceed on his own. *Id.* § 3730(b)(4)(B). If the suit is successful, the relator receives a portion of the Government's award. *Id.* § 3730(d). If the Government takes over, the relator will receive between 15 and 25 percent of the Government's proceeds, "depending upon the extent to which the person substantially contributed to the prosecution of the action," plus reasonable expenses. *Id.* § 3730(d)(1). If the relator proceeds on his own, he will receive between 25 and 30 percent of the proceeds, plus reasonable expenses. *Id.* The *qui tam* relator is also protected by a "whistleblower" provision which provides relief to any employee who suffers retaliation for bringing a claim under the FCA or assisting an employee-relator who does so. *Id.* § 3730(h). The whistleblower protection extends to any relator who brings a claim in good faith, whether or not it is successful.

A.

We must determine whether Cook County is a "person" within the meaning of the FCA.[4]

---

[4] Under Illinois law, Cook County is a "home rule" unit. Secretary of State of Illinois, *Illinois Counties & Incorporated Municipalities* 30 (1993); *see also* Ill. Const. Art. VII § 6; *Nevitt v. Langfelder*, 157 Ill. 2d 116, 623 N.E.2d 281, 285 (Ill. 1993) (noting that Cook County and the City of Chicago are the only home rule units in Illinois with populations in excess of 1 million people). "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const. Art. VII, § 6(a). Home rule status is automatically granted to any municipality with a population greater than 25,000 and any county with a chief executive elected by the voters, or any municipality who chooses such status by referendum. *Id.*

The issue is one of statutory interpretation. Therefore we must ascertain the will of Congress; we must determine whether Congress, when it enacted the FCA, intended counties to be defendants in *qui tam* suits.

We begin, as always, with the text of the statute. Congress provides no definition of "person" within § 3729. There have been only cosmetic changes to this section since the FCA was first adopted in 1863; therefore, the definition of person has remained constant throughout the FCA's history. *See Stevens*, 529 U.S. at 783 n.12, 120 S. Ct. 1858. The Supreme Court has noted that, by 1844, both private and municipal corporations were presumptively included within the meaning of "person." *See Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Nowhere in the text is there an exception for suits against municipalities. Nor have the parties suggested any other statutory provision that would limit the text before us.

The structure of the statute does not appear to bar a finding that counties may be sued under the FCA. The FCA creates a mechanism designed to discover and correct fraud against the federal government. In a *qui tam* suit, the relator must inform the Department of Justice of his intention to sue and must keep his suit under seal for sixty days while the Justice Department decides whether to prosecute the action itself.[5] The parties have not suggested anything in the structure of the

---

The legislature may preempt the taxing power of a home rule unit by a three-fifths vote of both houses. *See id.* § 6(g). The legislature may also preempt, by ordinary majority vote, "any power or function of a home rule unit other than a taxing power" or certain local improvements and special services. *Id.* §§ 6(h), (l).

[5] There is no reason to presume that a decision by the Justice Department not to assume control of the suit is a commentary on its merits. The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney.

FCA, when read as a whole, that would require anything other than a straight-forward reading of the text.

The 1986 amendments to the FCA did not change the meaning of "person" nor did these legislative changes explicitly include or exclude suits against municipalities. However, three of the changes to the FCA made by Congress in 1986 are relevant to this case. That year, Congress adopted what is now 31 U.S.C. § 3733, which permitted the Attorney General to issue a Civil Investigative Demand ("CID") to "any person" who "may be in possession, custody, or control of any . . . information relevant to a false claims law investigation." *See* 31 U.S.C. § 3733(a)(1). A CID requires its recipient to produce documents, answer interrogatories and give oral testimony. *Id.* Political subdivisions of states were included within the CID provision's definition of "person." *See id.* § 3733(l). Second, Congress adopted a "whistle-blower" statute, protecting relators and their witnesses from retaliation by employers. *See id.* § 3730(h). Finally, Congress increased the penalties for violations, from $2,000 per claim and double damages to $5,000-$10,000 per claim and treble damages. *Id.* § 3729(a)[6]. We believe that a proper understanding of each of these changes points to a finding of continued municipal liability.

The CID provision was added to provide the Justice Department with a new weapon to discover fraud and investigate false claim suits. That section defines "person" as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." *Id.* § 3733(l)(4).[7] The CID's definition of person

---

[6] This change shifted the FCA's damages regime from a compensatory system to a punitive one, *see Stevens*, 529 U.S. at 785-86, 120 S. Ct. 1858, thereby implicating municipalities' common-law immunity from punitive damages. *See infra* § II(B).

[7] The Supreme Court in *Stevens* found that this definition militated against a finding that states were within the definition of "person." *See*

at least demonstrates that Congress intended that states and their subdivisions be potential targets of false claim investigations. Although this definition does not demonstrate Congressional intent to impose liability on municipalities, it certainly does not support an inference that Congress intended them to be exempt. Every change made in 1986 made it more likely for FCA claims to be filed and to succeed.

Further, the legislative history of the 1986 amendments, in particular that accompanying the whistleblower provision, makes it likely that the Congress, when voting on the amendments, was aware that the FCA might reach municipalities. The Senate Judiciary Committee's report states that "the False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." S. Rep. 99-345 at 8 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5266, 5273.[8] In discussing the whistleblower provision, the

---

Stevens, 529 U.S. at 784, 120 S. Ct. 1858. The court reasoned that if Congress wanted to include states within the ambit of § 3729, it could have provided a similar definition within that provision. *Id.* Given the presumption that States are not included within the definition of "person," "the failure to add States to § 3729 suggests that States are not subject to *qui tam* liability under § 3729." *Id.* at 784 n.14, 120 S. Ct. 1858. Municipalities and other political subdivisions, however, are presumptively within the meaning of "person." Congress' inclusion of "political subdivision of a State" within § 3733's definition of person and its exclusion from § 3729's definitions section does not have the same meaning as Congress' similar action with regard to states. We need not draw the same inference the Supreme Court drew from this aspect of the statute's structure because Cook County does not enjoy the same privilege of place within our constitutional structure enjoyed by states.

[8] The Supreme Court in *Stevens* found this statement to be erroneous. *See Stevens*, 529 U.S. at 783 n.12, 120 S. Ct. 1858. The committee's error, however, was in presuming that "person" in its broad sense included states which, as *Stevens* points out, is not the case. Given the sovereign

Committee report defines "employers" to "include public as well as private sector entities." *See id.* at 34-35. Unless municipalities are subject to suit under the FCA, Congress would have no reason to be concerned that municipalities might retaliate against their employees for bringing FCA claims. Given that states are excluded from the definition of "person" within the FCA, the only public entities remaining are municipal corporations and other political subdivisions of states which are not arms or agencies of state government.

This reading of the 1986 amendments is compatible with other evidence that Congress' purpose in enacting those amendments was to increase the effectiveness of the Act. *See* S. Rep. No. 99-345 at 2 (1986) ("In order to make the statute a more useful tool against fraud in modern times, the Committee believes the statute should be amended in several significant respects. The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward."). Congress also increased the percentage of the Government's proceeds a relator may receive where the Government assumes responsibility for the action. Before 1986, a relator's share was capped at ten percent of the award. *See* 31 U.S.C. § 3729(c)(1) (1983). Now, a court has discretion to give the relator between fifteen and twenty-five percent, but fifteen percent is the minimum award. 31 U.S.C. § 3730(d)(1). Before 1986, if a relator proceeded on his own, his potential

---

status of states, Congress must do something more to bring states within the coverage of a federal law than enact a law aimed at "persons," even if that term is used in its broadest sense. *See id.* at 780-81, 120 S. Ct. 1858. The same is not true of municipal corporations and other governmental bodies within state boundaries. Therefore, while the committee report was incorrect with respect to the liability of states under the FCA before 1986, we believe it was correct in asserting that political subdivisions of states were, and are, subject to suit under the FCA so long as they are not properly considered arms of the state itself.

award was capped at twenty-five percent, *see* 31 U.S.C. § 3729(c)(2) (1983); now twenty-five percent is the minimum he would receive, with a maximum of thirty percent. 31 U.S.C. § 3730(d)(2). These changes both encourage *qui tam* suits and encourage cooperation with the Department of Justice.

The 1986 amendments also added several provisions which deter frivolous suits and give courts the discretion to restrict a relator's participation in suits when the Government has intervened. The district court can restrict the relator's participation if he remains in the case for purposes of harassment, 31 U.S.C. § 3730(c)(2)(C); the court may stay discovery if the relator's actions interfere with the Government's investigation, *id.* § 3730(c)(4). If the basis for the suit was information that was already available, a district court may limit a relator's recovery to 10 percent of the award, *id.* § 3730(d)(1), or bar the suit entirely unless the Attorney General prosecutes the case, *id.* § 3730(d)(4)(A). If the relator himself planned or was guilty of violations of the FCA, the court may dismiss his suit. *Id.* § 3730(d)(3). If the relator proceeds with the suit himself and the court finds that the suit was "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment," the court may award the defendant attorneys' fees and expenses. *Id.* § 3730(d)(4). Finally, the FCA bars suits against members of Congress, members of the judiciary and senior executive branch officials. *Id.* § 3730(e)(2). These changes gave courts more discretion to regulate *qui tam* suits and to weed out illegitimate actions.

Congress also changed the knowledge element of the offense, making success more likely. Some confusion had arisen about the standard of intent necessary for a finding of liability under the FCA. Congress adopted § 3729(b) which defines knowing and knowingly to mean that a person "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts

in reckless disregard for the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b). This definition sets a fairly low standard, making it easier for the United States to prevail in FCA actions.

We must conclude that a study of the text and structure of the Act, supported by the available legislative history, leads to the conclusion that Congress intended to include counties within the meaning of "person."

B.

Cook County nevertheless urges that we are prohibited from interpreting the statute to include counties because of the municipalities' traditional, commonlaw immunity from punitive damages. The Supreme Court in *Stevens* stated that, by increasing the damages from double to treble in 1986, the FCA was transformed from a remedial statute to a punitive one. *See Stevens*, 529 U.S. at 785-86, 120 S. Ct. 1858.[9] Because damages under the FCA are now considered to be punitive, we turn to the question of whether Congress has made it sufficiently clear that municipalities do not enjoy the traditional common-law immunity of municipalities from punitive damages for FCA claims.

We begin with the Supreme Court's decision in *City of Newport v. Fact Concerts*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). *See Doe v. County of Centre*, 242 F.3d 437, 454 (3d Cir. 2001) (using *City of Newport* to analyze whether municipalities were immune from punitive damages in suits brought under the Americans with Disabilities Act and the Rehabilitation Act). In *Newport*, the Court was called upon to decide whether a municipality was immune from

---

[9] The Supreme Court had held that the double damages recoverable before 1986 were remedial. *See United States v. Bornstein*, 423 U.S. 303, 315, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976).

punitive damages under 42 U.S.C. § 1983. *See Newport*, 453 U.S. at 249, 101 S. Ct. 2748. The Court could find no evidence that Congress intended to disturb the settled common-law immunity of municipalities from punitive judgments. *See id.* at 265, 101 S. Ct. 2748. Under the § 1983 statutory scheme, there is no guidance from Congress as to the damages to be imposed, or to the limits on the amount of punitive damages a jury may assess.

Compensatory damages, designed to make the victim of unconstitutional behavior whole, are a permissible basis of recovery and, although punitive damages, properly calculated, serve many salutary purposes when a truly egregious situation is presented, they remain a windfall for the fully compensated plaintiff. There is always the danger that the "deep pocket" of the municipality's tax base will tempt a jury to succumb to an unprincipled determination. *See Newport*, 453 U.S. at 270, 101 S. Ct. 2748. In light of these factors, the Court in *Newport* found no basis for disregarding the presumption that a municipal entity ought not be subjected to such a liability.

In *Newport*, the court identified a "two-part approach" for "scrutinizing a claim of immunity proffered by a municipality." *Id.* at 259, 101 S. Ct. 2748. Such a claim requires "careful inquiry into considerations of both history and policy" to determine "both the policies that it [the immunity] serves and its compatibility with the purposes" of statutes, *id.* Earlier, in *Owen v. City of Independence*, 445 U.S. 622, 635, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), the Court had noted that "the question of the scope of a municipality's immunity from liability . . . is essentially one of statutory interpretation." For instance, in the context of § 1983, the Court concluded in Newport that immunity from punitive damages was not inconsistent with the purposes of § 1983, *see Newport*, 453 U.S. at 271, 101 S. Ct. 2748; however, in *Owen*, the Court held that municipal immunity based on the

good faith of its officers was inconsistent with § 1983, *see Owen*, 445 U.S. at 657, 100 S. Ct. 1398. In both cases, the Court looked at the fit between the purpose of the asserted immunity and the Congressional intent in enacting § 1983.

Given the Supreme Court's analysis in *Newport*, we must examine the purpose of municipal immunity from punitive damages to determine if it is consistent with the False Claims Act. In the context of section 1983, the Supreme Court wrote in *Newport*: "Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers." *Newport*, 453 U.S. at 263, 101 S. Ct. 2748. Punitive damages are borne by "the very taxpayers and citizens for whose benefit the wrongdoer [is] being chastised." *Id.* Ordinarily, punitive damages "are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* at 267, 101 S. Ct. 2748.

However, not all punitive damage regimes are identical. Indeed, there are important differences between those available under § 1983 and those imposed by the FCA. Under the FCA, at least a portion of the recovery will come from the monies taken by the municipality through its false claims, whereas under § 1983 both the compensatory and punitive damages come directly from the tax base. Further, in the FCA context, the taxpayers themselves have been enriched by the fraudulent conduct of the municipality. Presumably any ill-gotten gains from the federal government produce more services or lower taxes. Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit. Congress' precision in crafting the FCA's damage regime suggests to us that it carefully considered all its options before enacting this particular system. Unlike § 1983, the FCA does not need to borrow a common-law conception

of damages; Congress has provided a clear and consistent remedy for all violations of the FCA. And, unlike under § 1983, we need not worry about the "broad discretion traditionally accorded to juries in assessing the amount of punitive damages," *Newport*, 453 U.S. at 270, 101 S. Ct. 2748, because the FCA affords the judge little discretion in imposing penalties on offenders.

The FCA damages scheme mandated by Congress is not divided into compensatory and punitive damages. Under the FCA, damages are limited to $10,000 per claim plus three times the amount of the false claims. 31 U.S.C. § 3729(a). Although the trebling of the actual loss is indeed a significant enhancement and punitive in nature, it is nevertheless a response specifically determined by Congress as necessary for the effective operation of the FCA. It could not be more clear that Congress, in adopting this approach, addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute. Notably, Congress did make an exception to the general measure of damages when the person who has defrauded the Government cooperates before having learned of the investigation. 31 U.S.C. § 3729(a)(7)(A)-(C). In such a case, the court has discretion to impose double, rather than treble, damages. *Id.* The damages are imposed by the judge, not the jury. *See In re Schimmels*, 85 F.3d 416, 416 n.1 (9th Cir. 1996). By contrast, Congress made no adjustment to the general scheme for municipal entities.

The Supreme Court has noted that the definition of "person" has remained unchanged since the adoption of the FCA in 1863. *See Stevens*, 529 U.S. at 782-83, 120 S. Ct. 1858. As noted above, counties were subject to suit in 1863. Were we to hold counties immune from the FCA's damages scheme, we would frustrate the clear intention of Congress. The original FCA damages regime was remedial. *See United States v. Bornstein*, 423 U.S. 303, 315, 96 S. Ct. 523,

46 L. Ed. 2d 514 (1976). In 1986, in an effort to increase the effectiveness of the FCA, Congress increased the per claim penalty from $2,000 to a minimum of $5,000 and the overall damages from double to treble. To hold that municipalities are immune, we would have to conclude that, in effecting this increase, Congress intended to exempt municipalities from the FCA sub silentio.

Congress was aware of the Court's decisions in *Newport* and *Bornstein*; it was only in 2000 that the Supreme Court characterized the FCA's remedy as punitive. Congress also was aware of the presumption that municipalities are included within the meaning of the term "person," *see Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and that municipalities are treated differently from states within our constitutional system, *see Comm. Communications Corp. v. Boulder*, 455 U.S. 40, 51-53, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982), *superseded by* 15 U.S.C. §§ 34-36; *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394-96, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978), superseded by 15 U.S.C. §§ 34-36. In enacting the 1986 changes to the statute, which form the basis of Cook County's immunity argument, Congress did not indicate in any way that it intended to exempt municipal entities from the scope of the statute. When it desires to exempt municipal entities from federal statutory schemes, Congress has not hesitated to do so. *See, e.g.*, 15 U.S.C. §§ 34-36 (exempting local government units from liability for damages under the antitrust statute); 42 U.S.C. § 1981a(b)(1) (exempting governments from punitive damages under employment discrimination statute).

Dr. Chandler and the United States suggest that, if we hold Cook County to be immune from punitive damages, we ought to hold further that Cook County may still be sued under the FCA, but be held to a lower measure of damages. In our view, the legislative record affords us no justification for

undertaking such judicial blue-penciling of the statute. Congress has provided one remedy for violations of the False Claims Act. If municipalities are immune from punitive damages, then they are, effectively, immune from liability under the FCA. There is no indication that Congress intended the FCA to apply to municipal entities but at a lower penalty. *See United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 493 (5th Cir. 2001). As we have just noted, the penalty scheme is a carefully measured approach by Congress designed to impose a penalty compatible with the objectives of the Act. We therefore must either apply the entire statute to municipal entities or declare them to be exempt under the FCA.

Billions of dollars flow from the federal government to municipalities each year. Congress, in creating, in 1863, and then strengthening, in 1986, a comprehensive mechanism designed to remedy fraud against the federal government clearly determined that recipients of federal funds must be subject to such a deterrent. Given this legislative judgment, municipalities' common-law immunity from suit is inconsistent with Congress' purpose in adopting the FCA. Unlike § 1983, which creates a cause of action without specifying a remedy, the FCA includes a carefully crafted remedy for violations. Accordingly, despite the presumption against the imposition of punitive damages on municipalities, it is clear that Congress, in enacting the 1986 changes to the FCA, made a conscious choice to increase the recoverable damages while in no way indicating that it wished to exempt municipalities. Therefore, the interpretive presumption has been overcome.

C.

Nevertheless, Cook County contends, the Supreme Court's decision in *Stevens* mandates a different result. The district court, as had the Fifth Circuit, *see Garibaldi*, 244 F.3d at 493-94, agreed. We believe that this proposition is unsound and

respectfully disagree with the conclusion reached by our sister circuit.[10] In our view, such a reading of *Stevens* cannot be squared with the essential rationale of that opinion nor with the established doctrinal differences, long recognized in our jurisprudence, between the status of the states of the Union and municipal entities. *See Stevens*, 529 U.S. at 779-80, 120 S. Ct. 1858. *Stevens* quite appropriately recognizes that the states, as sovereign entities within our federal union, must be accorded, in their relationships with the federal government, certain attributes of sovereignty. *Cf., Printz v. United States*, 521 U.S. 898, 918-21, 926-28, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (holding that Congress could not commandeer state executive officers to enforce federal gun control law); *Seminole Tribe v. Florida*, 517 U.S. 44, 55, 70-72, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (holding that Congress cannot abrogate states' 11th Amendment immunity through the powers granted in Article 1 of the federal constitution). Among these attributes is the presumption that states, as sovereigns, are not included within the term "person." *See Stevens*, 529 U.S. at 780, 120 S. Ct. 1858.

The central holding of *Stevens* is that states are not within the FCA's definition of "person" because of the "long-standing interpretive presumption that 'person' does not include the sovereign." *Stevens*, 529 U.S. at 780, 120 S. Ct. 1858. "The presumption is 'particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.'" *Id.* at 781, 120 S. Ct. 1858 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)). This presumption is applied to protect the states because of their dignity as sovereigns within our system of federalism. It is akin to the clear statement rule which requires "that if

---

[10] Because our holding on this point creates an intercircuit conflict, this opinion has been circulated to the entire court. Circuit Rule 40(e). No judge in active service has requested a vote to hear this case en banc.

Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will*, 491 U.S. at 65, 109 S. Ct. 2304 (internal citations and quotations omitted). The presumption cuts the other way for municipalities. *See Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The Supreme Court has never imposed this same requirement on Congressional efforts to make municipal entities amenable to federal legislation. *Cf. Bd. of Trustees v. Garrett*, 531 U.S. 356, 368-69, 121 S. Ct. 955, 148 L. Ed. 2d 866 (discussing the different requirements for imposing federal liability on states and municipalities); *Monell*, 436 U.S. at 701, 98 S. Ct. 2018 (stating that absent a clear statement to the contrary, municipalities were presumptively included within the meaning of the term "person"). Such constitutional concerns applicable to states do not apply to municipalities. Therefore, there is no such rule of construction applicable here. *Cf., Garrett*, 531 U.S. at 368-69, 121 S. Ct. 955 ("[Cities and counties] are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part . . . when only the States are the beneficiaries of the Eleventh Amendment."); *Alden v. Maine*, 527 U.S. 706, 756, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) ("The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."). The rationale of *Stevens* simply cannot support the interpretation that Cook County wishes to place on it.

Accordingly, counties are not only amenable to the FCA but also are subject to the same penalties as other defendants.

III

A.

In light of the above discussion, Cook County will once again be a party to this action. We therefore must address its appeal of the district court's discovery order of March 14, 2001. Normally, discovery rulings are unappealable, because the disadvantaged party has a remedy at the end of the district court proceedings.[11] This court has held that a party seeking to obtain appellate review of a discovery order before judgment should accept a contempt citation, and then appeal. *See Allendale Mutual Ins. Co. v. Bull Data Sys. Inc.*, 32 F.3d 1175, 1179 (7th Cir. 1994). "[R]equiring the complaining party to take some risk—to back up his belief with action—winnows weak claims." *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992). However, in extraordinary circumstances, mandamus may be an appropriate remedy where the petitioner can show "irreparable harm . . . and a clear right to the relief sought." *In re Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992). We believe Cook County has made such a showing here.

"Mandamus may not be used to get around the limitations on the appealability of interlocutory orders." *Mulay Plastics, Inc. v. Grand Trunk Western R.R. Co.*, 742 F.2d 369, 371 (7th Cir. 1984). However, the circumstances here present the necessary predicate for such an extraordinary remedy. The district court's discovery order implicates regulations protecting the confidentiality and integrity of federally-funded substance abuse programs. *See* 42 U.S.C. § 290dd-2;

---

[11] Because Cook County is reinstated, we need not consider the County's argument that we have jurisdiction under the doctrine of *Dellwood Farms v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997). *Dellwood* held that "[w]hen the [discovery] order is directed against a nonparty, as it is here, he has no appellate remedy at the end of the litigation, so he is allowed to appeal immediately." *Id.* at 1125.

42 C.F.R. §§ 2.11, 2.63-64. If Cook County is correct, allowing Dr. Chandler's representatives to view the unredacted patient records would cause serious harm to those patients' privacy rights and to the federal programs protected by a comprehensive regulatory scheme. Congress and the Department of Health and Human Services have made it clear that regulations are necessary to protect "the patient, the physician-patient relationship, and the treatment programs." *See* 42 C.F.R. § 2.64(d). It is not only the privacy rights of individual patients that are at stake here, but also the continued effectiveness and viability of important substance abuse treatment programs. *See United States v. Smith*, 789 F.2d 196, 205-06 (3d Cir. 1986) (noting that "there is a public interest in maintaining the confidentiality of patient records" in drug and alcohol treatment programs). Patients will be less willing to seek treatment if patient confidentiality is not strictly protected. The First Circuit, in upholding the validity of § 2.63 wrote: "The purpose of [the statute] is clear. Congress recognized that absolute confidentiality is an indispensable prerequisite to successful alcoholism research. Moreover, confidentiality is necessary to encourage successful alcoholism treatment. Without guarantees of confidentiality, many individuals with alcohol problems would be reluctant to participate fully in alcoholism programs." *Whyte v. Conn. Mut. Life Ins. Co.*, 818 F.2d 1005, 1010 (1st Cir. 1987); *see also Mosier v. Am. Home Patient, Inc.*, 170 F. Supp. 2d 1211, 1214 (N.D. Fla. 2001) (noting that "this particular privilege is a strong one"). The same is true of drug treatment. In short, because important private *and* public rights will be irretrievably compromised if the County is correct but the information is nevertheless released prior to the entry of a final judgment, mandamus is an appropriate remedy.

B.

We therefore turn to an assessment of Cook County's contention that the district court's order is violative of the statute and regulations.

Federal law restricts the disclosure of information obtained "in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research" conducted by the United States or with federal money. 42 U.S.C. § 290dd-2. Disclosure is permitted with patient con sent, 42 U.S.C. § 290dd-2(b)(1), or "[i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm," *id.* § 290dd-2(b)(2)(C). "In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. . . . [T]he court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure." *Id.* § 290dd2(b)(2)(C).

The regulations divide information into two categories—confidential and non-confidential communications. The New Start records contain both. In both situations, when a court is preparing to order disclosure, notice must be sent to the patients and they must be afforded "[a]n opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order." 42 C.F.R. § 2.64(b). Such notice must be "adequate." *Id.* Notice was sent in 1999, after the district court's ruling on January 7 of that year granting Dr. Chandler's motion to compel. That notice informed patients that redacted copies of their records would be disclosed to Dr. Chandler's counsel. By contrast, patients have not been notified, and the March 14 order does

not contemplate such notice, that unredacted copies of their records will be disclosed to Dr. Chandler's representatives. To be adequate, notice must inform patients both of the nature of the disclosure and to whom the information will be disclosed. Patients must know what is at stake before they can make an informed decision about their potential intervention in Dr. Chandler's lawsuit. Patients who may not have been concerned enough about the disclosure of redacted records to intervene may well wish to be heard if the court is prepared to order disclosure of unredacted records.

Once notice has been given, with respect to both confidential and other communications, the district court must find that "(1) other ways of obtaining the information are not available or would not be effective; and (2) the public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services." 42 C.F.R. § 2.64(d). If a patient does not consent, confidential communications may only be disclosed by court order if:

> (1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury . . . (2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or (3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of confidential communications.

42 C.F.R. § 2.63(a). Because none of those conditions apply here, any confidential communications must be redacted before Dr. Chandler's representatives may view the records.

The district court's discovery order violates these regulations. It permits four individuals, three of Dr. Chandler's attorneys and a paralegal, to view all of the records for ten days. It places no restrictions on the type of information that will be made available to them. The statute and regulations do not contemplate even limited disclosure of non-confidential communications without notice or of confidential communications without one of the conditions of § 2.64 being satisfied.[12] Dr. Chandler maintains that she has no need to view confidential materials, therefore, the court should be able to craft an order which satisfies both the regulations and Dr. Chandler's legitimate need to view some of the non-confidential communications.

Mandamus will issue requiring the district court to vacate its discovery order. Given the lapse of time between the 1999 notice and the disclosure, new notice should be sent to all patients whose records might be examined by Dr. Chandler's representatives. Further, notice must be sufficiently clear that the New Start patients will understand, without the aid of counsel, what is at stake and what they must do to assert their rights. No disclosure may be made until sufficient time has passed to give the patients an opportunity to decide whether to intervene and to seek legal assistance.

Conclusion

Cook County is a person within the meaning of the False Claims Act and does not enjoy immunity from the FCA's

---

[12] The regulations provide that:

> Disclose or disclosure means a communication of patient identifying information, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

42 C.F.R. § 2.11.

damages scheme. Therefore, the district court's decision in 00-4110 is REVERSED and the case is REMANDED with orders to reinstate Cook County as a party to this action. The district court's discovery order runs afoul of federal privacy regulations and violates important private rights and public policies. Therefore, MANDAMUS will issue in 01-1810, and the district court is ordered to enter a new protective order consistent with this opinion. Each party shall bear its own costs in these appeals.

No. 00-4110 REVERSED and REMANDED.

No. 01-1810 MANDAMUS ISSUED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 514

UNITED STATES OF AMERICA *ex rel.*,
JANET CHANDLER, Ph.D.,
Plaintiff,

v.

THE HEKTOEN INSTITUTE FOR MEDICAL RESEARCH
and COOK COUNTY, ILLINOIS,
Defendants.

October 30, 2000, Decided
November 1, 2000, Docketed

JUDGE: ROBERT W. GETTLEMAN, *United States District Judge.*

OPINION AND ORDER

Plaintiff/relator, Janet Chandler, has brought this qui tam action on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. The claims and the facts of the case are described in the court's previous opinion, *U.S. ex rel. Chandler v. Hektoen Institute*, 35 F. Supp. 2d 1078 ("*Chandler I*"), and will not be repeated here.

In *Chandler I*, the court dismissed defendant Cook County Hospital, and denied the remaining defendants' motions to dismiss, finding that, (1) Cook County was a "person" for purposes of the FCA, and that the FCA's treble damages provision is compensatory rather than punitive. *Id.*, at 1086.

Cook County has filed a motion to reconsider those conclusions in light of the recent decision in *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 1858, 120 S. Ct. 1858, 144 L. Ed. 2d 836 (2000), issued after this court's ruling *Chandler I*, in which the Supreme Court held that a state is not a "person" subject to qui tam liability under the FCA, and that the treble damages provisions of the FCA are (contrary to this court's holding in *Chandler I*) punitive rather than compensatory. *Id.*, 120 S. Ct. at 1869; *see also Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617 (7th Cir. 2000). The court ordered briefing by the parties, and allowed the United States to file an amicus curiae brief in support of plaintiff's position.

Although this court finds no reason to alter its conclusion that the County is a "person" for purposes of the FCA, it is quite clear that under *Stevens* the County is immune from the imposition of punitive damages, which are mandatory if liability is found under the FCA. Plaintiff and the United States argue that, assuming the court reaches this conclusion, the court would be authorized to award lesser damages in order to allow this case to be continued against the County, suggesting that the court could award double damages (which have been held to be remedial rather than punitive; *see United States v. Bornstein*, 423 U.S. 303, 315, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976)). The court agrees with the County, however, that the court has no authority to rewrite the FCA in such a manner. As noted by the *Stevens* Court, the FCA allows a reduction in the mandatory treble damages only in certain instances, none of which are present in the instant case. *See Stevens*, 120 S. Ct. at 1869, n. 16.

The arguments advanced by plaintiff and the United States in the instant case were recently presented to and rejected by the United States District Court for the Eastern District of Pennsylvania. In a well-reasoned decision, which this court

adopts, Judge O'Neill, relying on *Stevens* and noting this court's earlier decision in *Chandler I*, held that the treble damages mandated by the FCA are punitive and may not be imposed on a county. *United States ex. rel. Dunleavy v. The County of Delaware*, 2000 WL 1522854, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa., Oct. 12, 2000). This court cannot improve on Judge O'Neill's reasoning, and therefore concludes that the County is immune from prosecution under the FCA because it is immune from any award or claim for punitive damages.

Accordingly, Cook County's motion to reconsider the ruling of February 8, 1999, is granted, and this action is dismissed with prejudice against the County. This matter is set for a report on status regarding the remaining defendant on November 2, 2000, at 9:00 a.m.

ENTER: October 30, 2000

Robert W. Gettleman
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 514

UNITED STATES OF AMERICA *ex rel.*
JANET CHANDLER, Ph.D.,
Plaintiff,

v.

THE HEKTOEN INSTITUTE FOR MEDICAL RESEARCH;
COOK COUNTY HOSPITAL; and COOK COUNTY, ILLINOIS,
Defendants.

February 8, 1999, Decided
February 9, 1999, Docketed

JUDGE: ROBERT W. GETTLEMAN, *United States District Judge.*

MEMORANDUM OPINION AND ORDER

Relator/plaintiff Janet Chandler ("plaintiff") has brought a three-count complaint against defendants the Hektoen Institute for Medical Research ("Hektoen"), Cook County Hospital ("CCH"), and Cook County (together, "the County Defendants"). Plaintiff alleges: (1) presentation of false claims in violation of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. (Count I); (2) retaliation in violation of the FCA (Count II); and (3) retaliatory discharge in violation of Illinois law and public policy (Count III). Defendant Hektoen moves to dismiss Counts I and III, arguing that: (1) the FCA's qui tam provisions are unconstitutional; and (2) plaintiff does not allege that Hektoen's actions violated clearly established Illinois public policy. Hektoen has also moved for an extension of time in which to answer Count II, pending the court's decision on the County Defendants' motion to dismiss Count II. The United States has filed an amicus brief in opposition to Hektoen's argument that the qui tam provisions of the FCA are unconstitutional.

The County Defendants have likewise filed a motion to dismiss the complaint, arguing that: (1) CCH is not a suable entity under Illinois law; (2) Count II fails to state a claim against the County Defendants because plaintiff was employed by Hektoen, not by the County; (3) the County Defendants are immune from punitive damages for Count III; (4) Count III fails to state a claim for retaliatory discharge; and (5) the qui tam provisions of the FCA are unconstitutional. The County Defendants have filed a supplemental motion to dismiss, arguing that they are not "persons" who can be sued under the FCA.[1]

FACTS

This action arises out of defendants'[2] alleged misconduct in implementing a federal research grant. In 1989, the National Institute of Drug Abuse ("NIDA") issued a request for proposals for a study investigating the treatment of drug-dependant pregnant women. In response, CCH submitted a

---

[1] On January 7, 1999, the court issued an opinion compelling defendants to produce certain documents and denying defendants' request that the court stay its discovery decision pending its decision on defendants' motions to dismiss. On January 13, 1999, the County Defendants filed a Motion for Reconsideration of a portion of the court's January 7 opinion, requesting that the court stay discovery pending its decision on the immunity claim defendants raised in their supplemental motion to dismiss.

[2] The court does not differentiate between Hektoen and the County Defendants when discussing parts of plaintiff's complaint where she uses the term "defendants" to refer jointly to all defendants.

grant application seeking $5 million to study 300 such women over the course of five years (the "New Start study"). CCH also submitted an Assurance of Compliance plan to a division of the United States Department of Health and Human Services ("HHS"). In this plan, CCH represented that its study would comply with federal regulations governing research on human subjects. NIDA initially awarded the grant to CCH (which developed the protocol to be used in performing the study), and later transferred the administration of the grant to Hektoen. Plaintiff was hired by Hektoen as New Start's project director on September 1, 1993.

The federal grant had two components. The clinical component was designed to provide the research subjects with a comprehensive medical and social service program that included drug treatment and prenatal care. The research component was designed to study whether the research subjects had benefitted from the comprehensive treatment program.

Plaintiff alleges that during her employ, she became aware that defendants were not complying with the terms of the grant or with federal regulations and were misrepresenting the progress of the New Start study. Specifically, plaintiff alleges that defendants: did not follow the mandatory protocol associated with research on human subjects and the dispensing of methadone to pregnant women; did not obtain informed consent from study participants; did not obtain thorough medical or drug histories from the participants; provided the participants with substandard care; failed to keep accurate records; and failed to randomize participants. Plaintiff also alleges that defendants reported "ghost" research subjects and submitted false progress reports to the government. Finally, plaintiff alleges that defendants violated the grant and federal law because they did not have procedures in place to protect whistleblowers from retaliation.

Plaintiff alleges that in 1994, she began informing doctors employed by CCH of her concerns that the study was violating the terms of the grant, the Assurance of Compliance plan, and federal regulations. She alleges that after reporting her concerns, Dr. Mason, an employee of CCH, rescinded a number of her responsibilities. Plaintiff also alleges that Hektoen retaliated against her by recalculating her vacation and sick time. According to plaintiff, after she reported in a draft of her paper for NIDA that the study had not been successful, she was further chastised by employees of both CCH and Hektoen. On January 24, 1995, John Prochaska ("Prochaska"), the administrator of Hektoen, accused plaintiff of lying in her monograph on the study and fired her. On February 21, 1995, plaintiff was formally removed as co-principal investigator of the study. Plaintiff subsequently testified at an HHS Commission on Research Integrity hearing, and in August 1996, a subdivision of HHS issued a report on the research conducted by CCH and Hektoen that identified "multiple failures to comply with requirements of the HHS human subjects regulations."

DISCUSSION

I. Defendant Hektoen's Motions

A. Motion to Dismiss Count I

Hektoen moves to dismiss Count I on the grounds that the qui tam provisions of the FCA are unconstitutional.[3] Hektoen argues: (1) qui tam relators do not have Article III standing to bring an FCA claim; (2) the qui tam provisions violate separation of powers principles by encroaching on the authority of the executive branch, U.S. Const., Art II, § 3; and (3) the qui tam provisions violate the Constitution's Appointments Clause, U.S. Const., Art II, § 2. Defendants rely

[3] The County Defendants incorporate this argument by reference in their motion to dismiss.

primarily on the reasoning of a lone decision from the Eastern District of Texas, *United States ex rel. Riley v. St. Luke's Episcopal Hospital*, 982 F. Supp. 1261 (S.D. Tex. 1997). The overwhelming majority of courts that have considered the issue have upheld the qui tam provisions of the FCA in the face of identical constitutional challenges.

1. Standing

Defendants argue that plaintiff does not have Article III standing to bring suit under the qui tam provisions of the FCA because she does not allege an injury-in-fact, one of the three elements of Article III standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The Seventh Circuit has held that because the United States is the real party in interest in a qui tam action, a relator has standing to pursue the suit as long as the federal government has suffered an injury-in-fact. *See United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1214 (7th Cir. 1995) ("It is enough . . . that the United States, as the entity on whose behalf and in whose name this suit was brought, has suffered an injury in fact under Article III. Requiring an additional showing of injury on the part of the qui tam relator would be an analytical redundancy.").

Although defendants acknowledge the existence of *Hall*, they urge this court to abjure binding precedent in favor of the reasoning of *Riley*, a district court decision from another circuit that explicitly disagreed with *Hall*. *See Riley*, 982 F. Supp. at 1266. Defendants also argue that *Hall* is not binding on this court because it did not arise under the FCA. However, *Hall* relied on FCA cases to draw its ultimate conclusion that qui tam relators need not demonstrate an injury-in-fact. *See Hall*, 49 F.3d at 1214 (quoting the Second Circuit's holding in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993): "[i]n a qui tam action [under the False Claims Act], the plaintiff sues on behalf of and in the name of the

government and invokes the standing of the government resulting from the fraud injury."). The FCA comports with the principle that "if an injured person assigns his right of action to someone else, the assignee has standing to enforce the right even though he is not the one who was injured by the defendant's wrongdoing." *National Ass'n of Realtors v. National Real Estate Ass'n, Inc.*, 894 F.2d 937, 941 (7th Cir. 1990).

Other courts have used similar reasoning to hold that qui tam relators have standing to bring suit under the FCA. *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) ("the FCA effectively assigns the government's claims to *qui tam* plaintiffs such as *Kelly*, who then may sue based upon an injury to the federal treasury."); *United States ex rel. Lamers v. City of Green Bay*, 924 F. Supp. 96, 98 (W.D. Wis. 1996) (agreeing with *Kelly*); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 836 (N.D. Ill. 1993) ("Congress . . . can transfer the rights of the United States to private citizens, and because it did just that through the FCA, plaintiffs have standing to sue."). The court finds that plaintiff has standing to bring this suit.

2. Separation of Powers

Hektoen also argues that the FCA's qui tam provisions violate the principle of separation of powers because they grant Congress exclusive control over executive functions. Article II vests the executive branch with the power to execute the laws. Because the FCA includes a number of provisions that enable the executive branch to maintain control over qui tam suits, the statute does not arrogate the executive function to Congress. Section 3730(b)(2) explicitly gives the Attorney General the authority to intervene and protect the interests of the executive branch, and § 3730(c)(2) gives the government the authority to dismiss or settle the action even if the relator objects. Although Hektoen argues that the government no longer retains control over the present

litigation because it has declined to intervene, the FCA grants the government the right to intervene at any time upon a showing of good cause. *See* 31 U.S.C. § 3730(c)(3).

This court follows the vast majority of courts that have considered this issue and finds that the FCA does not run afoul of the separation of powers doctrine. *See United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *Kelly*, 9 F.3d at 755 ("[T]he FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns."); *Kreindler*, 985 F.2d at 1155 ("[T]he FCA qui tam provisions do not usurp the executive branch's litigating function because the statute gives the executive branch substantial control over the litigation."); *see also Robinson*, 824 F. Supp. at 837. *But see Riley*, 982 F. Supp. at 1269 n.5 (noting in a footnote that "the qui tam provisions of the False Claims Act also raise serious constitutional concerns as to whether Congress may delegate the executive powers of law enforcement to private parties . . .").

3. Appointments Clause

Finally, Hektoen argues that the FCA's qui tam provisions violate the Appointments Clause, which vests the executive branch with the exclusive power to appoint officers to execute the laws of the United States. Numerous other courts have held that qui tam relators are not officers within the meaning of the Appointments Clause. *See, e.g., Taxpayers Against Fraud*, 41 F.3d at 1041 (holding that relators are not "officers" because the government may take control of such cases whenever it wishes, and because the relator's position is without tenure or continuous duties); *Kelly*, 9 F.3d 743, 757 (holding that unappointed qui tam relators do not wield so much governmental power that their appointments must conform to the requirements of the Appointments Clause);

Robinson, 824 F. Supp. 830, 836 (holding that relators are not officers because they seek to vindicate not only public rights, but their own private rights as well).

Hektoen argues that qui tam relators are officers by analogizing them to special prosecutors. The court notes that the Seventh Circuit has likewise analogized relators to prosecutors, *see Hall*, 49 F.3d at 1213, and has never expressed any concern that these private parties are "officers" appointed by Congress in violation of the Appointments Clause. The court finds that relators are unlike prosecutors because they are suing to protect private rights, not just the public interest, and because they stand to reap private financial gain. Moreover, because the government retains the right to intervene in a relator's suit at any time, relators do not wield enough governmental power to be officers under the Appointments Clause. The court finds that the FCA's qui tam relator provisions are constitutional, and therefore denies Hektoen's and the County Defendant's motions to dismiss Count I.

B. Motion to Dismiss Count III

Hektoen moves to dismiss Count III of plaintiff's complaint, arguing that plaintiff cannot state a claim for retaliatory discharge under Illinois law. Hektoen asserts that plaintiff does not allege a violation of a clearly mandated public policy, and that even if she could allege such a violation, the FCA provides her with an adequate remedy.

An employee can state a claim for retaliatory discharge only if she can demonstrate that she was terminated in retaliation for her actions, and that the discharge contravenes a clear mandate of public policy. *See Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353 (1978). "[P]ublic policy . . . is to be found in the State's constitution and statutes and,

when they are silent, in its judicial decisions." *Palmateer*, 85 Ill. 2d at 130, 52 Ill. Dec. 13, 421 N.E.2d 876. A plaintiff can survive a motion to dismiss only if she can show that the cited provision embodies a public policy and that the plaintiff's termination violates this public policy. *See Callozzo v. Office Depot, Inc.*, 1998 WL 111628, at *2 (N.D. Ill. Mar. 6, 1998) (citing *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 527, 88 Ill. Dec. 628, 478 N.E.2d 1354 (1985)).

Although plaintiff alleges retaliatory discharge, she does not identify the source of the public policy that defendants allegedly violated in terminating her. Plaintiff has not cited any statutory, constitutional, or other provision in her complaint. Rather, she merely alleges that she was terminated because she took steps to promote the health and safety of the research subjects, their fetuses, their offspring, and the public at large. Efforts to promote health and safety, standing alone, are not enough to make out a claim for retaliatory discharge. In *United States ex rel. Dihu v. IIT Research Institute*, 1998 WL 299390 (N.D. Ill. May 21, 1998), for example, a plaintiff brought an FCA claim and alleged retaliatory termination under both the FCA and state law. Although the plaintiff was concerned that certain practices at IIT were jeopardizing the health and safety of the workers, the only provision he cited was an internal Army regulation. *See id.* at *8. The court held that the plaintiff did not state a claim for retaliatory discharge because the regulations he cited did not have enough of a widespread impact on the state's citizens to embody public policy. *See id.* Plaintiff must invoke a rule that defendants violated in terminating her in order for the court to evaluate whether the violation of that rule violates state public policy.

Plaintiff may be attempting to argue that her termination contravened a public policy embodied in the FCA. However, the Illinois Supreme Court generally finds that only those statutes that impact the health and safety of citizens in general truly express public policy. *See Hamros v. Bethany Homes*

and Methodist Hosp. of Chicago, 894 F. Supp. 1176, 1179 (N.D. Ill. 1995) (citing cases). Plaintiff does not argue that the FCA affects the health and welfare of citizens in general. The intent of the FCA is to protect the federal government, not individual citizens. Moreover, plaintiff does not advance any state law or public policy that prohibits fraud against the federal government. *See, e.g., Adler v. Continental Ins. Co.*, 1996 WL 677085, at *10 (D. Kan. Nov. 1, 1996) (finding that alleged retaliation in violation of the FCA did not contravene Kansas public policy because "there is no clearly established Kansas public policy aimed at preventing fraud against the federal government").

Even if plaintiff could properly allege that her discharge violated some clearly mandated state public policy, the court finds that Illinois courts would not expand the tort of retaliatory discharge to this case because the remedies embodied in the FCA serve as an adequate deterrent to future employer misconduct. As this court explained in *Hamros*: "Historically, courts have recognized the [retaliatory discharge] claim where the otherwise available remedies would not serve as an effective deterrent . . . ." 894 F. Supp. at 1179 (citing cases). Plaintiff argues that the Seventh Circuit has allowed plaintiffs to proceed with state retaliatory discharge claims that are supported by the same facts as federal claims, citing *Wright v. Illinois Dep't of Children & Family Services*, 40 F.3d 1492, 1508 (7th Cir. 1994) (arising under § 1983); and *Gooden v. Neal*, 17 F.3d 925, 929 (7th Cir. 1994). *Gooden* held that the plaintiff's retaliatory discharge claim was distinct from his First Amendment claim. *See* 17 F.3d at 929 ("To prevail under state law Gooden did not have to establish that his reports were protected speech, and the tort of retaliatory discharge in Illinois has not developed in precisely the same way as constitutional torts . . . .").

Unlike the First Amendment, the FCA contains a specific provision that punishes employers who discharge employees

in retaliation for exercising their rights under the statute. See § 3730(h). In this respect the FCA is analogous to the FMLA, which this court and other courts have held provides a remedy that adequately deters retaliatory discharge. *See Callozzo*, 1998 WL 111628, at *5; *Hamros*, 894 F. Supp. at 1179. Like the FMLA, the FCA provides for a number of statutory remedies, including liquidated damages (in the form of a double back pay award) designed to deter the employer from future unlawful conduct. *See Hamros*, 894 F. Supp. at 1179; *see also Dihu*, 1998 WL 299390, at *8 ("In this case, Dihu's Illinois claim essentially mirrors his retaliatory discharge claim under § 3730(h) of the FCA, and thus recognition of the Illinois common law claim is not necessary for Dihu to obtain the relief he seeks"). The court concludes that plaintiff has failed to demonstrate that her discharge controverts established Illinois public policy, and that even if she had shown a violation of public policy, the FCA provides her with an adequate remedy. The court grants Hektoen's motion to dismiss Count III of plaintiff's complaint.

II. County Defendants' Motions

A. Supplemental Motion to Dismiss FCA Claims (Counts I and II)

The County Defendants argue that they cannot be sued under the FCA because: (1) the County is not a "person" under the FCA; and (2) the FCA's treble damages provision is punitive, and municipalities are exempt from punitive damages. Defendants rely primarily on a New York district court decision, *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998). Although this is a case of first impression in this circuit, the weight of authority in other circuits holds that states are persons within the meaning of the FCA and that the FCA's treble damages provision is not punitive.

1. The County is a "Person" Under the FCA

The court considers two factors in determining whether the County is a "person" under the FCA: (1) the text of the statute; and (2) its legislative history. The statute renders liable "any person who" submits false claims to the federal government. 31 U.S.C. § 3729(a). The FCA does not define the term "person" as used in § 3729(a). However, the civil investigative demand provision of the act includes in its definition of person "any State or political subdivision of a State." 31 U.S.C. § 3733(1)(4). In addition, courts have interpreted the statute to include states among the "person[s]" who may file qui tam actions under § 3730(b). *See, e.g., United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 205 (2d Cir. 1998) (holding that in light of the legislative history of § 3730(b), "Congress viewed the States as persons who could be qui tam plaintiffs"); *United States ex rel. Woodard and State of Colorado v. Country View Care Center, Inc.*, 797 F.2d 888, 893 (10th Cir. 1986); *United States ex rel. Hartigan and State of Illinois v. Palumbo Brothers, Inc.*, 797 F. Supp. 624, 631 (N.D. Ill. 1992) ("We conclude that the FCA was specifically amended to provide jurisdiction for qui tam plaintiffs like Illinois.").

The court concludes that Congress intended the word "person" to have the same meaning in each section in which it is used. *See Commissioner v. Lundy*, 516 U.S. 235, 250, 116 S. Ct. 647, 133 L. Ed. 2d 611 (1996) (applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal citations omitted). The text of the statute and other federal courts' interpretation thereof suggest that states and their political subdivisions are "person[s]" under § 3729(a). *Accord Stevens*, 162 F.3d at 205; *United*

States ex rel. Zissler v. Regents of the University of Minnesota, 154 F.3d 870, 875 (8th Cir. 1998).[4]

The legislative history of the FCA likewise suggests that Congress intended to include states and other units of local government as "persons" who can be sued under the act. The Senate Report accompanying the 1986 amendments to the FCA, in a section describing the history of the act, states: "The False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." S. Rep. No. 99-345, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273-74. Other courts have held that this language indicates that Congress interpreted the FCA as applying to states and other local governments. *Stevens*, 162 F.3d at 207; *Zissler*, 154 F.3d at 874-75; *United States ex rel. Long v. SCS Business & Technical Institute*, 999 F. Supp. 78, 85 (D.D.C. 1998). The County Defendants rely heavily on *Graber*, the one case that has held otherwise. The district court's decision in that case, however, was issued after *Stevens* had been argued but before the Second Circuit issued its opinion, which effectively overruled *Graber* by holding that the FCA applied to states and local governments.[5]

---

[4] Only *Graber* has held that states were not "person[s]" who could be sued under the act, and even *Graber* conceded that "[e]ither proffered construction arguably would be consistent with the text of the statute." 8 F. Supp. 2d at 355. Moreover, *Graber* relies on the district court's decision in *Zissler*, which was reversed by the Eighth Circuit on appeal as cited above.

[5] The district court in *Graber*, after a thorough analysis of the caselaw referenced in the Senate Report, concluded that the report was incorrect because it misinterpreted that caselaw. *Id.* at 352. Regardless of whether Congress misunderstood the way courts had interpreted the term "person" before the 1986 amendments, however, "this understanding was that the False Claims Act applied to the States, and would, after the 1986 amendments, continue to apply to the states." *Zissler*, 154 F.3d at 874-75.

2. The Damages Imposed by the FCA Are Not Punitive

The County Defendants argue that even if the County is a "person" under § 3729, the County is immune from suit under the FCA because the act imposes punitive damages. The Supreme Court has held that municipalities are immune from punitive damages in § 1983 suits. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). The Court found that imposing punitive liability on municipalities does not fulfill the traditional purposes of punitive damages, deterrence and retribution. *Id.* 453 U.S. at 267-71, 101 S. Ct. 2748.[6] Defendants concede that the Supreme Court has held that the FCA is not a punitive statute. *See, e.g., United States v. Halper*, 490 U.S. 435, 449, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) (holding that the FCA's "fixed-penalty-plus-double-damages provisions" does not, in most cases, constitute punishment for the purposes of double jeopardy), *overruled on other grounds by Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (rejecting *Halper*'s definition of "punishment" in the double jeopardy context because double jeopardy merely prohibits the imposition of additional criminal sanctions, not of all additional sanctions that might be termed punishments); *United States v. Bornstein*, 423 U.S. 303, 314-15, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52, 63 S. Ct. 379, 87 L. Ed. 443 (1943) ("[T]he chief purpose of the statute[] here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure

---

[6] The parties do not dispute that City of Newport applies to counties as well as municipalities. *See Erwin v. County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989) ("On a custom and policy claim a governmental body such as the County cannot be held liable under 42 U.S.C. § 1983 for punitive damages.").

that the government would be made completely whole."). Defendants argue, however, that the foregoing cases are no longer apt, because they were decided before the 1986 amendments to the FCA. According to the County Defendants, Congress transformed the FCA into a punitive statute by revising its damages provisions to allow for treble damages rather than a fixed penalty plus double damages.

Although the Seventh Circuit has yet to address the issue, a number of other circuit and district courts have held that the FCA's treble damages provision is not punitive. *See, e.g., Stevens*, 162 F.3d at 207; *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996); *United States v. Barnette*, 10 F.3d 1553, 1559-60 (11th Cir. 1994); *Long*, 999 F. Supp. at 85-86. *But see Graber*, 8 F. Supp. 2d at 349. The Supreme Court has held that the federal government "is entitled to rough remedial justice." *Halper*, 490 U.S. at 446, 109 S. Ct. 1892. *Halper* reasoned that the multiple recovery allowed under the FCA was compensatory, not punitive, because it was rationally related to the government's loss. *Id.* 490 U.S. at 449, 109 S. Ct. 1892.

Under *Halper*, "proportionality is the key." *Barnette*, 10 F.3d at 1560. The compensation the government requested in *Halper* was vastly disproportionate to its losses: Although the government had suffered only $16,000 in actual damages, it requested an additional fine of $130,000, a ratio of 8 to 1. *See Barnette*, 10 F.3d at 1560 (discussing *Halper*, 490 U.S. at 452, 109 S. Ct. 1892). In the present case, plaintiff claims $5 million in actual damages to the government and seeks $15 million in compensation, plus between $5,000 and $10,000 per false claim, far less than the ratio in *Halper*. Raising the stakes from double to treble damages does not render the relationship between loss and recovery irrational in the present case. *See Brekke*, 97 F.3d at 1048 (holding that a post-amendment FCA case was compensatory and not punitive) ("We do not see how the treble damages provision of the False Claims Act is different from the 'ordinary case' discussed in *Halper*," the case in which the damages were a fixed penalty plus double damages); *Barnette*, 10 F.3d at 1560 (holding that a 3.2 to 1 ratio of compensation to actual damages is not punitive).

In an attempt to argue that the FCA's treble damages provisions are penal, the County Defendants analogize the statute to the civil Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. Both RICO and the antitrust laws authorize treble damages. The Seventh Circuit has held that "a treble damage antitrust suit is most appropriately characterized as an action for a penalty," and has likewise held that "[b]ecause a civil RICO claim is best characterized as an action for treble damages, . . . such an action is penal in nature." *Tellis v. United States Fidelity & Guaranty Co.*, 805 F.2d 741, 746 (7th Cir. 1986), *vacated Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987). However, the Seventh Circuit has addressed the nature of treble damages in antitrust and RICO actions for the narrow purpose of electing the state statute of limitations to apply to such actions. *See, e.g., id.* (holding that because civil RICO is penal in nature, Illinois' two-year statute of limitations for actions based on a statutory penalty applies to civil RICO claims); *Schiffman Bros. v. Texas Co.*, 196 F.2d 695, 696 (7th Cir. 1952) ("[T]he real question facing us, therefore, was not whether the action was one to recover a statutory penalty within the meaning of any federal statute but whether actions such as this are limited to a period of two years under the Illinois statutes. . . . We are not concerned at all, then, with anything other than the question of what statute of limitations of Illinois is applicable to actions to recover treble damages.").

The Seventh Circuit has never held that treble damages are, by definition, punitive. *See, e.g., Adler v. Northern Hotel Co.*, 175 F.2d 619 (7th Cir. 1949) (holding that treble damages under the Housing and Rent Act are remedial in nature). The

reach of *Tellis*' holding is further undermined by language in *Agency Holding Corp.*, which held that the Clayton Act's four-year statute of limitations applies to RICO claims as well, overruling *Tellis* and other cases that had applied state law statutes of limitations to RICO claims. *See Agency Holding Corp.*, 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121. *Agency Holding Corp.* described RICO and the Clayton Act as "designed to *remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees," and explained that "both statutes aim to *compensate* the same type of injury." *Id.* 483 U.S. at 151, 107 S. Ct. 2759 (emphasis added). The Court's use of compensatory, rather than punitive, language to discuss the purpose of civil RICO and the antitrust laws suggests that the two statutes' treble damages provisions are not wholly punitive in nature.

Finally, according to the legislative history, the purpose of the 1986 amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government" and "to make the statute a more useful tool against fraud in modern times." S. Rep. No. 99-345, at 1, *reprinted in* 1986 U.S.C.C.A.N 5266; *see also Zissler*, 154 F.3d at 874. These broad goals suggest that Congress did not intend to place beyond the reach of the statute a large class of potential wrongdoers—municipalities, counties, and other units of local government. Taking the allegations of the complaint as true for the purposes of the present motion to dismiss, the County defendants fall within this class of wrongdoers.

The court finds that: (1) the County is a "person" for the purposes of the FCA; and (2) the FCA's treble damages provision is more compensatory than punitive. *See Stevens*, 162 F.3d at 207; *Zissler*, 154 F.3d at 875; *Taxpayers Against Fraud*, 999 F. Supp. at 78; *see also Brekke*, 97 F.3d at 1048 ("A multiple recovery of this type is compensatory rather than punitive, even though it contains a penalty element . . . ."). The FCA applies to the County.

B. Motion to Dismiss CCH

The County Defendants move to dismiss CCH from the complaint because the hospital does not have a legal existence separate from that of Cook County. *See Payne v. Cook County Hosp.*, 719 F. Supp. 730, 734 (N.D. Ill. 1989). Because Cook County is the appropriate defendant in this action, the court grants the motion to dismiss the hospital as a separate defendant.

C. Motion to Dismiss FCA Retaliatory Discharge Claim (Count II)

The County Defendants move to dismiss Count II, arguing that it does not state a claim against them. The FCA's retaliatory discharge provision reads:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h). The County Defendants argue that plaintiff cannot state a claim under § 3730(h) because she does not allege that she was employed by the County.

Plaintiff does not allege sufficient facts from which the court can infer that the County Defendants were her employers. Plaintiff alleges that Hektoen hired her as the New Start project director on October 1, 1993, that she was employed by Hektoen, and that Prochaska, Hektoen's administrator, ultimately fired her. Although plaintiff alleges that Dr. Mason, an employee of CCH, removed medical and

childcare matters from plaintiff's responsibilities as project director, these allegations do not prove that CCH was plaintiff's employer.

At best, plaintiff alleges that Dr. Mason conspired with Hektoen to retaliate against plaintiff. The County Defendants cite a well-reasoned district court case holding that § 3730(h) liability cannot be extended to non-employers on the basis of a conspiracy. *See Mruz v. Caring, Inc.*, 991 F. Supp. 701, 709 (D.N.J. 1998). The court agrees that the plain language of § 3730(h) "reflects a legislative intent to operate exclusively in the area of the 'employment relationship.'" *Id.* at 708. Although plaintiff argues that Cook County should be liable for the acts of its employees whether or not they are key decisionmakers, she does not establish as an initial matter that Cook County or any of its employees were her "employer" under the plain language of the statute. The County Defendants' motion to dismiss Count II is granted.

D. Motion to Dismiss State Law Retaliation Claim (Count III)

The County Defendants move to dismiss Count III of plaintiff's complaint, arguing that plaintiff cannot state a claim for retaliatory discharge under Illinois law. The County Defendants also move to strike from Count III plaintiff's request for punitive damages against them. Because the court has found that plaintiff cannot state a retaliatory discharge claim and that she does not allege that the County Defendants employed her, the County Defendants' motions are granted.

CONCLUSION

The court denies Hektoen's and the County Defendants' motions to dismiss Count I on the ground that the FCA's qui tam provisions are unconstitutional. The court likewise denies the County Defendants' supplemental motion to dismiss Count I against them on the ground that they are not suable "persons" under the FCA.

The court grants the County Defendants' motion to dismiss CCH because Cook County is the appropriate defendant in this action. Because plaintiff does not allege that she was employed by the County, the court grants the County Defendants' motion to dismiss Count II against them. Finally, the Court grants Hektoen's and the County Defendants' motions to dismiss Count III because plaintiff does not allege that her discharge violated clearly established Illinois public policy.

The court declines to stay discovery pending Cook County's appeal of the court's immunity decision. This case is already two years old. Moreover, this case will proceed against Hektoen regardless of the outcome of an appeal by the County. Even if the County were not a party to this suit, the documents plaintiff requests would be subject to subpoena, and as a non-party the County would have no claim of immunity.

February 8, 1999

Robert W. Gettleman
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

May 18, 1999

Before HON. JOHN L. COFFEY, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 99-1415

JANET CHANDLER, Doctor,
Plaintiff-Appellee,

v.

COOK COUNTY, ILLINOIS
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 97 C 514—Robert W. Gettleman, Judge

ORDER

On consideration of the jurisdictional papers, submitted by the parties,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction. Cook County seeks to appeal an interlocutory order denying its motion to dismiss. There is no arguable immunity issue and no basis for appellate jurisdiction over Cook County's appeal. Cook County must await a final decision in order to appeal.

APPENDIX E

528 U.S. 931, 145 L.Ed.2d 257
120 S. Ct. 329

Oct. 12, 1999

No. 99-266

COOK COUNTY,
Petitioner,

v.

JANET CHANDLER,
Defendant.

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.